

R. P. Prst.

REPORTS

AND

CASES,

Collected by the Learned

S^{r.} John Popham K^{t.}

Late LORD CHIEF JUSTICE

o f

ENGLAND.

Written with his own Hand in *French*, and now
faithfully translated into *English*.

To which are added some Remarkable CASES
Reported by other Learned Pens since his death.

*With an Alphabetical Table, wherein may be found the Principal
Matters contained in this Book.*

L O N D O N;

Printed by the Assigns of Richard and Edward Atkins.

And are to be sold by John Place, at his Shop at Furnivals-Inne-
Gate in Holborn: 1682.

—5805, f. 14.

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РНПЧ

ЛНД

САГИЕ

СОВЕТСКАЯ СФЕРА

СЛОВОВОДСТВО

СОВЕТСКОЕ СЛОВО



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ДОКТОР

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TO THE
READER.

Courteous Reader;

Albeit the name of the Compiler of the greatest part of the ensuing REPORTS (for *Demonstratio fit a parte majori & meliori*) would be a sufficient invitation to any understanding Reader, not only to cast his Eye upon, but seriously to peruse them; yet because these two Questions may (and no doubt will, and that upon good ground) be made: as, 1. Why they should lye so long in private hands, without being exposed to the publick view? 2. Why they should be now Printed?

To the first I answer, That by the handsome composition and connexion of them, it may (and that very probably) be conjectured, that the honourable Compiler at first intended them for the publick; but they (after his death) coming into private hands, they who became possessors of them, did rather intend their own, and their friends private knowledge and advantage by them, than to let others communicate therein: for it hath not formerly been (neither yet is) a thing unusual, for the great and learned Professors of the Law, to ingross into their own hands the best, and most authentick REPORTS, for their better help, credit and advantage in the course of their practise; which being unknown to other men, they cannot upon sudden occasions, be ready to make answer thereunto: and that might be the reason why they have not been as yet published.

To the second I answer, that the Copy (out of which this Translation was made) coming out of the Library

of a reverend and learned Serjeant at Law now deceased, and said therein to be written with the proper handwriting of the Lord P O P H A M (a good ground to conceive that it was Authentick) the Gentleman, in whose hand it was, was earnestly importuned for the Copy, that it might be made publick ; to whose importunity there was at last a condescension, so as such due care might be taken both in the Translation and Printing, as not to prejudice the Author, or the matter therein contained : And whether that condition be fully performed, shall be now left to the candid interpretation of the judicious Reader, who cannot but know that some *Errata's* (let the Printer or Corrector be never so careful) will follow the Press ; but it is hoped that nothing material or substantial is committed, or omitted to the prejudice of the Work, or of the Compiler thereof. There is an addition of some later Cases in the time of King J A M E S , and the late King C H A R L E S , which were taken by judicious Pens, as will evidently appear by the Cases themselves ; and I dare say, that whoever reads them, will neither think his Time or Money mispent, they being such as are well digested, and very practical. I shall add this one thing more, that the principal end of this Edition is, the advancement of Knowledge, and to impart the good thereof to those who heretofore wanted what is hereby made publick, which may (peradventure) be a means to invite others more learned to publish other things of the like nature, for the benefit of Students, and Professors of the Law.

T H E

To old TA

THE
NAMES
OFF THE
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AND OTHER
CASES
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BOOK.

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CASES

C A S E S

Reported by
S. JOHN POHAM K.
Lord Chief Justice of
E N G L A N D,

In the time of Queen ELIZABETH.

And written with his own Hand in *French*, and now faithfully done into *English*. To which are added some remarkable CASES, Reported by other Learned and Judicious Pens, since his death.

Fenner *versus* Fisher.
Mich. 34 and 35 Eliz. Regne, in the King's Bench.

In Trespals brought by Justice Fenner against Andrew Fisher, for a Trespal done in the Parsonage House of Crayfords in the County of Kent 30. Maii 34 of the Queen, the Defendant pleaded that one was seized of the same Pessuage in his Demesne as of his, and being so seized, the day of in the same year, did demise it to the Defendant for two years, from such a Feast then last past; by virtue of which he entered and was possessed, until the Plaintiff claiming by colour of a Deed made of the said Wright where nothing passed by the Deed, upon which the Defendant entered, &c. The Plaintiff replies by protestation, that the said Wright was not seized as the Defendant hath alledged: And for Plea saith, that the said Wright did not let it to the Defendant, as the Defendant hath alledged; upon which being at Issue, & found for the Plaintiff, Atkinson moved, that Judgment ought not to be given for the Plaintiff, because that he hath not made any Title by his Replication, for by 9 E. 4. 49. In Trespals the Defendant pleads in Bar and gives colour to the Plaintiff, it is taken for a Rule that the Plaintiff ought to make Title: Coke answered, that he needs not to make Title in this case, but that it sufficeth to traverse the Bar without making a Title, and said that in 22 E. 4. Fitzh. Trespals, It is adjudged that in Trespals the Plaintiff may traverse the Bar without making Title in his Replication; and here in as much as it is acknowledged by the Defendant, that Wright did demise it to the Plaintiff, and that this is a Lease at will at the least not defeated by his own shewing, but by the Lease made to the Defendant. This being traversed, and found against the Defendant, the Plaintiff, by the acknowledgement of the Defendant himself, hath a good Title against him to enter into the Land, and by it the Defendant by his Re-entry is become Trespassor to the Plaintiff; and he said, that in 2 E. 4. fol. In Trespals where the Defendant pleads that he let the Land to the Plaintiff for another man's use, and that he

for whose life it was, was dead, upon which he entered, and it is adjudged that it sufficeth for the Plaintiff to maintain that Cestuy que Vie was yet living without making any other Title: And yet for these reasons Clinch and Gawdy held the Replication good, to which Popham said, that we as Justices ought not to adjudge for the Plaintiff where a good and formal bar is pleaded as here it is. But where by the Record it self which is before us, we cannot see that the Plaintiff hath good cause of Action: And therefore I agree that in Trespasses in some cases the Plaintiff may traverse the Bar, or part of it, without making any other Title than that which is acknowledged to the Plaintiff by the Bar, but this always ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroy by the same Bar, for there it sufficeth the Plaintiff to traverse that part of the Bar which goeth to the destruction of the Title of the Plaintiff compassed in the Bar, without making any other Title, but if he will traverse any other part of the Bar, he cannot do it without making an especial Title to himself in his Replication, whereby the Bar the first possession appeareth to be in the Defendant, because that although the Traverse there be found for the Plaintiff, yet notwithstanding by the Record in such a Case the first Possession will yet appear to be in the Defendant, which sufficeth to maintain his Regrets upon the Plaintiff, and therefore the Court hath no matter before them in such case to adjudge for the Plaintiff, unless in cases where the Plaintiff sheweth a special Title under the Possession of the Defendant; As for example, in Trespasses for breaking of his Close, the Defendant pleads that J.G. was seised of it in his Demesne as of Fee, and enfeoffed J.K. by virtue of which he was seised accordingly, and so being seised, enfeoffed the Defendant of it, by which he was seised, until the Plaintiff claiming by colour of a Deed of Feoffment made by the said J.G. long before that he enfeoffed J.K. (where nothing passed by the said Feoffment) entered, upon which the Defendant did re-enter, here the Plaintiff may well traverse the Feoffment supposed to be made by the said J.G. to the said J.K. without making Title, because that this Feoffment only destroys the Estate at will made by the said J.G. to the Plaintiff, which being destroyed he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment of the said J.K. For the first Possession of the Defendant is a good Title in Trespasses against the Plaintiff, if he cannot shew or maintain a Title Paramount. But the Feoffment of the said J.G. being traversed and found for him, he hath by the acknowledgement of the Defendant himself a good Title against him, by reason of the first Estate at will acknowledged by the Defendant to be to the Plaintiff, and now not defeated: But in the same case he cannot traverse the Feoffment supposed to be made to the said J.K. to the Defendant, without any especial Title made to himself; for albeit that J.K. did not enfeoff the Defendant, but that the Defendant disseised him, or that he cometh to the Land by another means, yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any matter which appeareth by the Record, upon which the Court is to adjudge; and with this accord the opinion of 31 E. 4. 1. That the material matter of the Bar ought always to be traversed, or otherwise that which upon the pleading is become to be material, and that which the Plaintiff traversed here, to wit, the Lease made by Wright to the Defendant is the material point of the Bar which destroyed the Title Paramount acknowledged to the Plaintiff by the colour given in the Bar which is good without another Title made: So note well the diversity where in pleading in Trespasses the first Possession is acknowledged in the Plaintiff by the Bar, and where it appeareth by the pleading to be in the Defendant, and where, and by what matter the first Possession acknowledged in the Plaintiff by the Bar is avoided by the same Bar; And upon this, Judgment was given for the Plaintiff, as appeareth in 34 and 35 Eliz. R. 1.

Earl of Bedford versus Eliz. & Anne Russel.
Mich. 34 and 35 Eliz.

2. In the Court of Chancery the Case was thus, between the now Earl of Bedford, and Elizabeth and Anne the Daughters and Heirs of John late Lord Russel, which was upon this to all the Justices to be resolved: Francis late Earl of Bedford, himselfe of the Manors of Barunke Chaldon, &c. in Comitatu Dorset, in his Denechtine as of fee, and so leased the fourth year of Queen Eliz. of it entailed the Lord & John of Bedfode, and others in fee, to the use of himself for forty years, from the date of the said Deed, and after to the use of the said John then his second Son, and the Heirs Males of his body; and for default of such Issue, then to the use of the right Heir of the said Earl the Feoffor forever: Afterwards Edward Lord Russel Son and Heir Apparent to the said Earl died without Issue, and after the said John Lord Russel died without Issue Male, having issue the said two Daughters, afterwards to wife 27 Eliz. the said Francis Earl of Bedford, by Indenture made between him and the Earl of Cumberland and others in consideration of the advancement of the Heirs Males of the body of the said Earl, which by course of descent should or might succeed the said Earl, in the name and dignity of the Earldom of Bedford, and for the better establishment of his Lordships Mannors and Hereditaments, in the name and blood of the said Earl, covenanted and granted with the said Cobdances, that he and his Heirs hereafter shall stand seised of the said Mannors (amongst others) to the use of himself for life, without impeachment of Waste, and after his decease to the use of Francis the Lord Russell, and the Heirs Males of his body; for default of such Issue, to the use of Sir William Russell Knight, his youngest Son, and the Heirs Males of his body, with divers Remainders over: after which the said Francis Lord Russell died, having issue Edward the now Earl of Bedford, and after this the said Francis late Earl of Bedford died also, and after the Daughters of the said John Lord Russell, or the now Earl of Bedford, shall have these Mannors of Barunke, &c. was the question; and upon this it was argued by Coke, Sollington and others, for the Daughters, that an use at Common Law, was but a confidence put in some to the benefit and behof of others, and that Conscience was to give remedy, but for those for whose avail the confidence was, and that was in this Case, for the said Daughters which were the right Heirs to the said Francis late Earl of Bedford, upon the first conveyance made 41 Eliz. for the confidence that he put in the Feoffees, as to the profits that he himself was to have, was but for the forty years, and how can any other say that he shall have any other Estate, when he himself saith, that he will have it but for forty years, and therefore in this case his right Heir shall take as a Purchaser, by the intent of the Feoffor, which hath power to make a disposition of the use at his pleasure, and his pleasure (as appeared) was to have it so, and it is not as if the use had been limited to be to himself for life with such a Remainder over, in which Case the use of the Fee by the operation of Law ought to execute in himself for the free-hold which was in him before: As where Land is given to one for life, the Remaider to his right Heirs, he hath a Fee-simple executed, but here he shall have but an Estate for forty years precedent, and that the Fee-simple cannot be executed by such a limitation made to the right Heirs; but in case of an Estate for years only precedent such a limitation to his right Heirs afterwards is not good, but in case of an use it is otherwise, for it may remain to be executed, to be an use in esse where the right Heir shall be, and therefore not to be resembled to an Estate made in Possession. And an Use is always to be guided according to that which may be collected to be the purpose and intent of the parties: And therefore if a man make an Estate of his Land without limitation of any use or confidence, the Law shall say that it is to his own use, but if it be upon confidence then it shall be to

the Use of the party to whom it is made, or according to the confidence which shall be absolute, or according to that which is limited, which may alter that which otherwise shall be taken upon the general confidence, as 30 H. 6. Fitz. Devise, If a man devise Lands to another in Fee, he hath the use and Title of it, but if it be limited to his use for his life only, the use of the Fee shall be to the Heir of the Devisor, for by the limitation his intent shall be taken to be otherwise, then it should be taken if this limitation had not been; and in as much as in this case the Earl reserves to himself but the use for years, it is evident that his intent never was to have the Fee, to surrender this Term, which perhaps he intended to be for the benefit of his will, which shall be defeated contrary to his purpose, if the Fee shall be also in him by the death of the said John, without Issue Male, and therefore the said Daughters ought to have the Land. And on the other part it was argued by Glanvil Herjeant, and Egerton the Attorney General, that this limitation made to the right Heirs, is void in the same manner, as if a man give Lands to another for life, the Remainder to the right Heirs of the Feofor, in this case the Heir shall take by descent as a Reversion remaining to the Feofor, and not as a Remainder devested out of him, for the ancient right privilege the Estate which he may take, and therefore he shall take it by descent, and not by purchase, for the name of right Heir is not a name of purchase betwixt the Ancestor and his heir, because that doth instance that he happened to be heir, he takes it by descent, and then it comes too late to take by purchase. And another reason that the Daughters should not have it is, because that when Sir John Russel dies without Issue Male, which Estate might have preserved the Remainder, if it shall be a Remainder, there was not any right heir or the said Francis Earl of Bedford to take this Remainder, because that the said Earl survived him: And therefore it is to be resembled to this Case; Land is given in Tail, the Remainder to the right Heirs of J. G. the Donee dies without Issue in the life of J. G. in this case, albeit J. G. dies afterwards having an heir, yet this heir shall never have the Land, because he was not heir in-Else to take it when the Remainder fell, and for the mean Estate for years this cannot preserve a Remainder, no more than when Land is given for years, the Remainder to the right heirs of J. G. this Remainder can never be good if J. G. be then living, because such a Remainder cannot depend but upon a Free-hold precedent at least, and therefore the Inheritance here shall go to the now Earl of Bedford by the second assurance. And upon consideration of the Case and several Conferences had upon this amongst the Judges and Barons, it was at last resolved by all (but Baron Clarke) that the Daughters shall not have the Mannors in the County of Dorset, but the now Earl of Bedford, and principally upon this reason, because there was no right heir to take as Purchasor where the mean Estate Tail was determined, which was by the Lord John, without Issue Male, for they agreed that the Remainder to the right heirs, if it be a Remainder, cannot be preserved by the mean Estate for years, for it ought to be a Free-hold at least which ought to preserve such a Remainder, until there be one to take it by name of Purchasor as right heir. And at this day they did not think there was any diversity between the Case of a Remainder, in Possession limited to the right heir of one, and of a Remainder in use so limited over to another.

Mich. 34 and 35 Eliz. In the King's Bench.

*Baron & Feofor
Purchasor*

3. **I**n Ejectione firms upon special verdict the case was thus, A man possessed of a Term of years in right of his wife, made a Lease for years of the same Land to begin after his death which was the Lessor, and afterwards he dyed and his Wife survived him, and the question was, whether the wife shall have the Land after the death of the husband, or the Lessee, for if the husband had devised

billed the same Land to an estranger, yet the Wife shall have it and not the Devisee, as it happened in the Case of Mathew Smith, who made first such a Devise of a Term of his Wife, and yet the Wife had it; because that by the death of the husband (before which the Devise did not take effect) the Wife had it in her first Right, not altered in the life of her Husband; but it was agreed in this case by all the Court, that the Lessor shall have it during his Term, soz as the husband during his life might contray for the Land for the whole term which the wife had in it, so might he do for any part of the term at his pleasure, for if he may devise the Land for one and twenty years to begin presently, he also may make it to begin at any time to come after his Death, if the term of the Wife be not expired, but for the Remainder of the term of the Husband, made no disposition during his life, the Wife shall have it, which by Popham this Case happened upon a special Verdict in the County of Somerset, about 20 Eliz. where he and Serjeant Baber were Practisers in the Circuit there, to wit, the Lands were demised to Husband and Wife for their lives the Remainder to the Survivor of them for years, the Husband granted over this term of years and died, and the question was whether the Wife shall have the term of years or the Grantee, and adjudged that the Wife shall have it, and it was upon this reason, because there was nothing in the one or the other to grant over, until there was a Survivor: And the same Law had been if the Wife had died after the Grant, and the Husband had survived, yet he shall have the term against his own Grant; as if a Lease were made for Life, the Remainder for years to him which first cometh to Pauls, if A. grant this Term for years to another, and afterwards A. is the first that cometh to Pauls, yet the Grantee shall not have this Term because it was not in A. by any means neither in Interest nor otherwise until he came to Pauls: As if a man make a Lease for life, the Remainder to the right Heirs of J. S. J. S. hath Issue a Son which selleth this Remainder, and afterwards J. S. died, this Son being his Heir, notwithstanding his Sale, he shall have this Remainder and not his Grantee, because it was not in him at the time of his Grant, but by a matter which cometh, Ex post facto, to wit the death of his father, and afterwards Judgment was given in the first case, that the Grantee shall have the term granted to him by the Husband, and that the Wife shall not have the term during this Lease.

Hunt Versus Gateler.
Mich. 34 and 35 Eliz. in Commun. Banco.

In a Replevin between Hunt Plaintiff, and Gateler Avowant in the Common Pleas, which was adjourned for difficulty into the Exchequer Chamber, the Case was thus, Tenant in Tail, Remainder in Fee, he in Remainder in Fee grants a Rent-charge in Fee out of the same Land, to begin after the Estate Tail determined, Tenant in Tail suffers a common Recovery with a Woucher over, to the use of the said Hunt in Fee, and dies without Issue inheritable to the Intail, and whether Hunt shall now hold the Land charged with the Rent, was the question; and after that it had long depended, and was many times argued in the Common Pleas, and Exchequer Chamber, at Hertford Term, it was at last resolved by all the Justices and Barons unanimously, that the said Rent-charge was gone by the Recovery, although the Estate Tail was expired, because that he which is in, is in under this Intail: And therefore Popham said, suppose that the Tenant in Tail himself before the Recovery had granted a Rent-charge out of the same Land, or had made a Lease for years, or had acknowledged a Statute, all these had been good, and to be executed against him which cometh in under the Recovery, notwithstanding that the Estate Tail had been determined for want of an Heir inheritable to

Vide this case
Coke lib. 1. 61.
by the name of
Capel's case.

to the Tail, for he which recovereth cannot say that he against whom he recovereth hath but an Estate in Land, and if his Lease remain yet good (as all agree it doth) how can the Lord, a Term granted by him in the Remainder, be good also, for the one and the other cannot stand together, and therefore all the Leases, Charges, or Incumbrances acknowledged or made by him in the Remainder, are gone and avoided by the Recovery had against Tenant in Tail. To which opinion all the other agreed, and Poplum laid further, That he in the Remainder upon an Estate Tail, cannot by any means plead to defend his Remainder, unless the Tenant will as by touching of him, and therefore shall be bound by the Act of Tenant in Tail, where the Tenant it self is bound as here it is by the Warden, and then they which come in by him in the Remainder by way of Lease, Charge, or Incumbrance, (which are not so much favoured in Law as Tenant in Tail himself) be in better condition than he in the Remainder himself is ; for he in the Remainder upon an Estate Tail cannot put more into the mouth of the Lessee or Grantee to defend their Estates, than he himself could have to defend his Remainder, and this is the reason that such a Tenant or Grantee shall never fallifie the Recovery had against Tenant in Tail, as the Grantee or Tenant shall do which cometh in under Tenant in Tail against whom the Recovery was had, for there as the Tenant in Tail may plead to defend his Possession and Estate, so may his Tenant or Grantee of a Rent-charge do, for by the Demise or Grant made, the Tenant in Tail hath put all the Pleas into their mouths for their Interests which he himself had to defend his Right and Possession, which they may plead for the time to defend their Possessions and Rights as well as the Tenant in Tail himself may do, and this is the reason that such may fallifie Recoveries against their Lessors or Grantees, if they be not had upon the meet right Parameter, which he that cometh in by such a Remainder as before cannot do, for such a one in Remainder cannot be received to defend his Right, but his mouth is nicely foreclosed to do it, and by the same reason are all those which cometh in by such men foreclosed to defend their Interests or Estates, and upon this Judgment was given in the same Term in the Common Pleas.

Gibbons versus Malyard and Martin.

Vide this case.
in Coke lib. 8.
130. Thetford
Schools case.

In an Ejectione firmæ, brought in the Kings Bench by John Gibbons Plaintiff, upon a Devisal made by Edward Peacock the Son, of Lands in Croxton, in the County of Norfolk, against Thomas Malyard and John Martin, upon a special Merit, the case appeared to be thus, to wit, that Sir Richard Fulmerston Knight, was Seised of the said Lands (amongst others) holden in Knighthood in his Domestinc as of Fee, and being so Seised by his last Will in Writing, made 9 Eliz. Ordained that a Devise shall be made by his Executors that a Preacher shall be found for ever to preach the Word of God in the Church of Saint Maries in Thetford, four times in the year, and to have for his labour ten shillings for every sermon. And further he devised to his Executors and their Heirs certain Lands and Tenements in Thetford aforesaid to this intent ; and upon this condition, that they or the Survivor of them within seven years after his decease, should procure of the Queens Highnes to erect a free Grammat School in Thetford for ever to be had and kepe in a house by them to be erected upon part of the said Land, and that they shall assure this of the said Tenements for the House and Chamber of the Schoolmaster and usher, and their Successors for ever, and for the other Tenement, that they shall make an assurance of it for the Habitation of four poor people (two men and two women) for ever. And for the better maintenance of the said Preacher, Schoolmaster, Usher and poor People,

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he devised (amongst others) his said Tenements in Croxton to his Executors for ten years for the performance of his Will, and after this he devised them to Sir Edward Cleer, and Frances his Wife (the Daughter and Heir of the said Sir Richard, and to the Heirs of the said Sir Edward, upon Condition, that if the said Sir Edward his Heirs or Assigns, before the end of the said ten years shall assure Lands or Tenements in possession to the value of five and thirty pounds a year, to the said Executors or the Survivor of them, their Heirs and Assigns, or to such persons their Heirs and Successors as his said Executors or the Survivor of them shall name or assign, for and towards the maintenance of the said Preacher, Schoolmaster and usher, in the said School-house, &c. and for the relief of the said poor people in the one of the said houses, according to the Ordinance as he himself in the said Will had declared, or otherwise as by his Executors or the Survivor of them shall be prescribed. And if the said Sir Edward and his Heirs shall make default in the assurance of the said Land by him to be assured as aforesaid, then he will that immediately upon such default, his Estate, and the Estate of the said Frances shall cease in the said Lands in Croxton, &c. and then he devise the same Lands to his Executors and their Heirs for ever to the use of them and their Heirs upon trust and confidence that they or the Survivor of them and their Heirs shall assure the same, or otherwise yearly dispose the profits of them in finding the said Preacher and other charitable works as aforesaid, and made Edward Peacock father to the Lessor (whole Heir the Lessor is) and others his Executors; and died 9. of the Queen, after whose Death all the Executors refuse to be Executors. The seven years pass without the establishing of the School, and other things according to the Will for the first part of it, whereby the Land in Thetford was forfeited to the Heir for the Condition broken, and within the ten years Sir Edward Cleer made a Feoffment of Land to the value of 35 l. a year to the surviving Executor, for the use of the School, but with a condition contrary to the Will, and no Livery was made upon the said Feoffment, but it was intolded of Record in the Chancery, whereby the said Sir Edward had broken the Condition annexed to his Estate; and also during all this time neither the Executors nor their Heirs had done any thing in finding the Preacher or the other works of Charity with the profits of the said Lands in Croxton, or in assuring of it according to the Will, and yet the said Edward Peacock the Son in September 32 Eliz. being Heir to the surviving Executor, entered into the Land in Croxton, and demised it to the Plaintiff for seven years, upon which the Defendant as Servant, and by the commandment of Sir Edward Cleer, and of Edmund the Son and Heir of the said Frances (who was then dead) entered, upon which Entry and Ejectment the Action was brought, and it was moved by Godfrey and others that the Entry of the Defendants was lawful, first in the right of the said Sir Edward, because that his Estate by the Statute of 23 H. 8. cap. was without condition, or determined; because that by this Statute all the uses limited in such a manner are made void, because they are in the nature of a Mortmain, as may appear by a Proviso at the end of the same Statute for a certain person of Norwich who had devised Lands for the ease of the poor Inhabitants of the same City, in Taxes and Tallages, and for cleansing of Streets there, and for discharge of Toll and Custom within the City, all which were good uses, and not tending to Superstition, and yet if it had not been for the Proviso they had been gone by the body of the Statute: and the Statute ordained also, that every penalty and thing which shall be devised to defraud this Statute shall be void; and if this do not help them, yet the Entry made in the right of the said Heir, of Sir Richard Fulmerston, is good; for the Estates of the said Executors are also bound as with a tacit condition that these things shall be performed which are not done, and therefore the Entry in right of the Heir

Heit is lawful, for the words Ad propositum, ea intentione, and the like in a Will are good Conditions which Gaudy agreed, and touched the case 28. Sess. Pl. but it was after often argument agreed by all the Court that the first exception was to no purpose, for they conceived that this Statute was to be taken to extend only to the uses which tend to Superstition, as might be collected as well by the words of it in the very body of the Act at the beginning, as by the time in which it was made, for at this time they began to have respect to the ruin of the Authority of the Pope, and to the dissolution of the Abbeys, Chancries, and the like : And by Popham, the Plaintiff was put in the Statute, but for satisfaction of the Bargesses of the same City at this time and not for any necessity as oftentimes it happens. And for the other point, he said, that it appeareth fully by the Will that it was not the intent of the said Sir Richard to have the Land in Croxton bound with any condition in the possession of his Executors, or with any other matter which determine their Estate, for the Words, that they shall have it upon trust and confidence, exclude all constraint which is in every condition, and the Will is, that they shall have it to the use of themselves and their Heirs for ever, which cannot be if it shall be abridged by any Limitation or Determination : And he said, that the Lord Anderson demanded of him a Case which was adjudged in the Common Pleas 29 Eliz. Rot. 639. which was thus, One Michel made a Lease for years rendering Rent, and for default of payment a Re-entry with Covenants on the part of the Lessor to repair the Premises, &c. and the Term continuing, the said Michel, by his Will in Writing, devised the same Land to the said Lessor for more years than he had to come in it, rendering yearly the like Rent, and under the same Covenants which he now holds it, and died, and afterwards the said Term expired, the Lessor does not repair the Houses, and the question was, whether by this he hath forfeited his Term, and adjudged that as to this it was not any condition, and a Covenant it could not be, for a Covenant ought always to come on the part of the Lessor himself, which cannot be in this case, for he doth not speak any thing in the Will to bind him, but they are all the words of the Devil, himself comprised in a Will, and it never was his intent to have it to be a condition, and therefore void as to the Lessor to bind him either by way of Covenant or Condition, so here, &c. And for the said Pleasement enrolled without Livery, it was agreed by all, that it was not of any force to make the Land to pass to the Executors, but the Exchequer concludes him to say not his Word ; And also that the Executors refuse to be Executors, this shall not hinder them to take by Devise as to the Inheritance ; whereupon it was adjudged that the Plaintiff shall recover as appears.

Thompson *versus* Trafford.

Hillary Term, 35. of Queen Elizabeth.

In an Ejecctione summa, between John Thompson Plaintiff, and Thomas Trafford Defendant, the case was thus, The President and Scholars of Magdalen College in Oxford, 20. Decemb. 8 Eliz. Did let a Premise in the Burrough of Southwark, to which no Land appertained, to William Stan-dish for twenty years, from the Feast of Saint Michael next ensuing, ren-ding the ancient Rent, and 25 Octob. 21 Eliz. they did let the same Pre-mise to the same Standish for twenty years from the Feast of Saint Michael then next ensuing, rending also the ancient Rent, and 31 August, 30 Eliz. The President and Scholars made a new Lease of the same Premise to Sir George Carew Knight, for twenty years from making of the Lease, ren-ding the ancient Rent, which Lease was conveyed by mean Alligaments to the Plaintiff, upon which the Action was brought against the said Trafford which

which had the Interest of the said Standish by mean Assignments: Popham said, that ipso facto upon the last Lease made, and annexed by Standish, the first Lease was determined and gone, for this last Contract dissolves the first when the one and the other cannot stand together, as they cannot here, because the one intermix with the other, and so way the opinion in the Common Bench about 1. Eliz. in the Case of the Abby of Barking, of which I have seen a Report. And here Standish before Michaelmas, next after the second Lease made to him could not grant over his first Term to be good to the Grantee, for if this should be, the second Term shall not be good to Standish; but for the remainder of the years after, the first Term finishes, which cannot be because it standeth in the power of the Grantor with the assent and acceptance of the Grantee to make the second Grant good, for the whole Term, to wit, from Michaelmas, and this cannot be but by a determination in Law of the first Term immediately, which is made by his own acceptance, and therefore a prejudice to none but himself, and Volenti non fit injuria, and the first Term cannot have his continuance until Michaelmas, but is gone presently by the acceptance of the second Lease in the whole, for the first Contract which was entire cannot be so dissolved in part, but in the whole, as to that which the Party hath, and therefore the first Term (as the Case is here) is gone in the whole, to which Clench and Gaudy agreed; and if so, then this last Lease to Standish was but as a Lease made to begin at a time to come, which is made good by the Statute of 14 Eliz. if it do not exceed the time of forty years from the making of the Lease; for the purpose of this Act was, that Colledges and the like shall not make Grants in Reversion, albeit it be for a year, and the reason was, because that by such Grants in Reversion they shall be excluded to have their Rent of the particular Tenants for the time: And therefore in the Case of the Countess of Sussex, who had a Joynture assured to her for her life by Act of Parliament, with a Proviso, that the Earl her Husband might demise it for one and twenty years, rendering the usual Rent, where the said Earl had made a Lease for one and twenty years, according to the Statute, within a year before the end of the same Lease, the said Earl made a new Lease of the same Land to Welsh his Servant for one and twenty years, to begin after the end of the former Lease, rendering the usual Rent, and died, the said Countess avoided this last Lease by Judgment given in this Court, because it shall be intended to be a Lease in Possession, which he ought to make by the Proviso, from the time of the making of it, otherwise by such perverse construction, the true intent of the Statute shall be utterly defrauded. But here to make a Lease for twenty years to one in possession, and to make another Lease to another for twenty years, to begin after the end of the former Lease, is good, because that the one and the other do not exceed the forty years comprised in the Statute.

And the Justices of the Common Bench the same day at Serjeants Inn agreed to the opinion of Popham for the determination of the whole first Term, by the taking of the second Term by Standish.

Ward

Ward versus Downing.

2. **I** ~~s~~ an Ejectione summe brought by Miles Ward against Robert Downing, the Case was thus : One Robert Brown was seised of certain Lands in the County of Norfolk, in his Demesne as of his (which were of the nature of Gavelkind) and had Issue George his eldest Son, William his middlemost Son, and Thomas his youngest Son, and being so seised 6 Decemb. 1559. made his Testament in Whiting, by which he devised the said Tenements in these words.

Item, I give unto Alice my Wife the use and occupation of all my Houses and Lands, as well Free as Copy-hold, during her natural life.

Item, I will, that George my Son shall have after the decease of his Mother all those my Houses and Lands, whereof the use was given to his said Mother for the term of her life, To have and to hold to him and his Heirs for ever, and if the said George die without Issue of his Body lawfully begotten ; then I will my said Lands shall in like manner remain unto William my Son and his Heirs for ever. And I will that all such Money as shall be paid of any Legacy by the said George, shall be allowed by the said William, to whom the said George shall appoint.

Item, I will, that if the said George and William depart the World before they have Issue of their Bodies lawfully : Then I will that all my said Houses and Lands shall remain unto Thomas my Son and to his Heirs for ever.

Item, That if the said George shall enjoy my said Houses and Lands, then I will that the said George shall pay out of the said Lands to William and Thomas his Brother 26 l. 13 s. 4 d. that is to say, at his first Entry into the said Lands, to pay unto the said William his Brother 40 s. and so to pay yearly until the sum of 13 l. 6 s. 8 d. be fully answered and paid, and then immediately to pay unto Thomas his Brother 13 l. 6 s. 8 d. to be paid unto the said Thomas, when the said William shall be fully answered by 40 s. a year, in like proportion as is aforesaid : And if my said Son George shall refuse to pay unto William and Thomas his Brothers the sum of 26 l. 13 s. 4 d. in manner and form as is before limited, Then I will that all my Houses Lands and Tenements with the Appurtenances remain to William my Son and his Heirs for ever, paying thereto 26 l. 13 s. 4 d. viz. 13 l. 6 s. 8 d. to George my Son, and 13 l. 6 s. 8 d. to Thomas my Son, in such manner and form as the said George shall pay it if he shalld enjoy the said Lands : And if it shalld come to the said William to enjoy the said Lands, then the said William shall pay unto Thomas his Brother the whole sum of 26 l. 13 s. 4 d. as is aforesaid. After which the said Robert died seised of the said Tenements in question, and his said Wife entred into them for her life by virtue of the said Will, in whose life time the said George died without Issue, after which the said Thomas also, to wit, 9 Dec. 1576. made his Testament in Whiting, and of this made Mary his Wife his Executrix, and died, having Issue Martha by the said Mary ; Afterwards the said Alice the Wife of the Deviloz, the last of March, 32 Eliz. died, and after her death, to wit, the first of May, 32 Eliz. the said William entred into the said Tenements, and was thereof seised in his Demesne as of Freehold, and the said Mary in the lifetime of the said Alice proved the Testament of the said Thomas Brown, and the said William did not pay the said 26 l. 13 s. 4 d. to the said Mary, nor any part thereof according to the Will, and the said Martha being Daughter and Heir of the said Thomas therupon entred into the said Tenements, and did let the said Property of which the said Action was brought to the said Ward for two years, upon which the said Downing in the Right and by the Commandment of the said William re-entered, and expelled the said Plaintiff, but the conclusion

conclusion of the Verdict was not upon the expulsion, but only if the Entry of the said Downing shall be adjudged lawful, then they find the Defendant not guilty, and if it were not lawful, then they find him guilty.

Fennor, the Estate of the said William is conditional by the Will, to wit, that he shall pay to Thomas the forty Marks, according to the Will, because the Will is, that the said Money shall be paid as is aforesaid, or before the said Money which were to be paid, was expressly limited to be paid upon the forfeiture of his Estate: And further if it shall not be taken for a Condition, then Thomas hath no remedy for the Money to be paid to him; and although it be limited to be paid but to Thomas, who was dead before the day of payment of it, yet it shall be taken as a duty limited to him which shall be paid to his Executors, because that a time certain is limited for the payment of it, to wit, when the Land is come to the said William, which is, by the death of the said Alice, but if no time had been limited for the payment of it, and they had died before the payment of it, it had been otherwise; And it being a Condition in William, albeit it descend upon him, as well upon him as upon the Heir of the said Thomas, yet it remains a good Condition for the part of the Heir of the said Thomas, not determined by the descent of the other part upon the Heir of the said William.

And further he said, that here the Condition shall not be said to be broken, but upon refusal of payment by the said William, as in the Case of George to whom it refers by the words (as is aforesaid) which refusal is not found, and therefore the Plaintiff shall be barred.

Clench, The Executors of the said Thomas know not when, nor at what place to demand it, and therefore he thinks that the said William ought to have rendered the Money to the said Executrix at his peril.

Popham, The payment limited to be made by the said George is at his first Entry after the death of Alice, and then to pay 40 s. and so yearly until 40 Marks are paid to the said William, and thereupon 40 s. yearly to the said Thomas, until other twenty Marks are paid to him; so that this is the form of the payment, to wit, at his Entry, as well for the place as the time, for it cannot be made at his Entry, unless upon the Land itself, and therefore by the purport of the Will, the Land shall be taken for the place where the payment ought to be made, for avoiding the inconvenience which otherwise will ensue; as if I am bound to pay to you 20 l. upon your first coming to such a place, this place shall be taken for the place where the payment shall be made. And whereas it is said further in the Will, and so to pay yearly 40 s. until till the twenty Marks are paid to William, this payment also by the words (and so to pay yearly, &c.) shall be at the same place at the end of every year, upon the next day after the end of it, or otherwise there will be no certainty when it shall be paid, and therefore the first day of every year shall be the very day of payment, and this also by virtue of the said words (and so yearly.) And at the last day of payment by George to William, or Thomas there ought to be paid but 26 s. 8 d. because that then there remains no more to be paid of the sums limited to be paid to them; And when the Will here hath finished with George for that which he is to pay, it goes further, and if he refuse to pay the laid sums to William and Thomas, in manner and form aforesaid, then he wills that all the said Lands shall remain to the said William and his Heirs for ever, paying yearly, &c. and so there is an express penalty to George if he refuse to make payment, to wit, that he shall lose the Land for default of payment made by George by the word (paying) annexed to the Estate which is a Condition, but he conceived that this last payment to be made to Thomas, is not to be made upon any penalty, nor that a Condition is to be implied in it, although Thomas hath no remedy for it, but in conscience, because it is a mere confidence put in William to pay it: And he said, that he was rather moved to be of his opinion, because every one of the

precedent Limitations was with an express Condition annexed to them, as to George, if he refuse, &c. But when William is to have but an Estate-tail upon the determination of the Estate made to George, for default of Issue there he saith nothing, but that the said William shall pay, to the said Thomas forty Marks, as is aforesaid, which is but a declaration of his intent, that he put confidence in him for the payment of it, and did not bind himself upon condition, as in the other cases, which he might have done by express words of condition, if his intent had been so, as well as he did in the other cases, if his purpose had been so; and the words, that he shall pay, as is aforesaid, is to be understood for the place and time when it shall be paid, according as George ought to pay it: And it doth not seem to stand with reason, to expound it, for a Condition to destroy the Remainder limited to the said Thomas; but if it shall be a Condition upon a relation, because of the words, that he shall pay it, as aforesaid mentioned, that the Payment ought to be paid to the Executor of the said Thomas, albeit he died before the day of Payment, because this was a sum in gross limited to be paid to the said Thomas at a certain time. But if it shall be taken for a Condition in William, he thinks clearly that the said William ought to have given notice to the Executrix of the said Thomas before he had made his first Entry into the Land of the Ten. when he intended to make his Entry, so that the Executrix might be there at the same time to have made Demand of the Money, which ought to have been done, or otherwise there cannot be a refusal in the said William, and without his refusal or other default in him, the Condition cannot be broken, if it had such a relation as it make the payment as George ought to do it: And so the Executor of Thomas cannot have notice when William will make his first Entry into the Land, if he do not give him notice of it, and therefore if it shall be a Condition it had been broken on the part of William, for want of giving notice to the Executor of the time of his first Entry, whereby the Executor might have notice of the time to make his demand, because without a demand a refusal cannot be, and the Executor is excused to make demand when he had no notice of the time, and therefore the default of William in not giving notice of it shall be taken against him as strongly as if he had made a refusal to pay upon demand; for if notice had been given to the Executor, and he had demanded the Money, and William had said nothing to it, but omitted to pay it, yet this shall be a refusal in Law.

But of this nothing appeareth in the Verdict, whether the Executor had notice given to him or not, nor nothing mentioned in the Verdict whether any demand or refusal was made of the Money or not, and therefore the Verdict as to these points is uncertain to judge upon, whether it shall be taken to be a Condition in William: But it seems as the Verdict is, that Judgment ought to be given against the Plaintiff, for the conclusion of the Verdict is upon the Entry of the Defendant, whether this be lawful or not, and not upon the expulsion, or whether upon the other Property his Entry was lawful in right of the said William, because they were Tenants in Common.

3. **N**o Trespass of Assault, Battery and Imprisonment, made such a day at in the County of Cornwall, brought by against : The Defendant saith, that he was Constable of the same Town, and that the Plaintiff the said day, year and place, brought an Infant not above the age of ten days in his arms, and left him upon the ground to the great disturbance of the people there being, and that he commanded the Plaintiff to take up the said Infant, and to carry it from them with him, which the Plaintiff refused to do, for which cause he quietly laid his hands upon the Plaintiff and committed him to the Stocks in the same Town, where he continued for such a time, until he agreed to take up the Infant again, which is the same Assault, Battery and Imprisonment, of which

which the Plaintiff complains, upon which the Plaintiff demurred. Fennor was of opinion that that, which the Constable did, was lawful, and that it is hard that an Officer shall be so drawn in question for it, for this shall be an utter discouragement to good Officers to execute their Offices as they ought to do. Popham, a Constable is one of the most ancient Officers in the Realm for the Conservation of the Peace, and by his Office he is a Conservator of the Peace; and if he has any breaking of the Peace, he may take and imprison him until he find Surety by Obligation to keep the Peace: And if a man in fury be purposed to kill, maim or beat another; the Constable seeing it, may arrest and imprison him until his rage be passed, for the conservation of the Peace. And if a Man lays an Infant which cannot help it self upon a Dunghil, or openly in the Field, so that the Beasts or Fowls may destroy it, the Constable seeing it may commit the Party so doing, to Prison: for what greater breach of the Peace can there be than to put such an Infant by such means in danger of its life? And what diversity is there between this case and the case in question, for no body was bound by the Law to take up the Infant but he which brought it thither, and by such means the Infant might perish, the default thereof was in the Plaintiff, and therefore the Action will not lie: And thereupon it was agreed that the Plaintiff take nothing by his *Writ*.

Hayes versus Allen.

4. Term. Pasch. 33 Eliz. Rot. 1308. A Cui in vita was brought in the Common Pleas, by Ralph Hayes against William Allen, of a Messuage with the Appurtenances in S. Dunstans in the East, London, in which it was supposed that the said William had no Entry, but after the Demise which John Bradley, late Husband to Anne Bradley, Aunt of the said Ralph (whose Heir the said Ralph was) made to Tho. Allen and Jo. Allen, and counts accordingly, and shews how Cousin and Heir, to wit, Son of Wil. Brother of the said Anne, W. Allen traverses the Demise made to the said Tho. and Jo. Allen, and at Nisi prius it was found, that the said Jo. Bradley and Anne his wife was seised in their Demesnes as of *fee*, in right of the said Anne, of a Messuage in S. Dunstans aforesaid, containing from the North to the South 18 foot, and from East to West 12 foot and an half, and being so seised during their Marriage, by their *Died*, sealed with their Seals, enfeoffed the said Tho. Allen and Jo. Allen thereof, to hold to them and their Heirs, to the use of the said Jo. Bradley and Anne his wife for their lives, and afterwards to the use of the Church Wardens of S. Dunstans, Lond. and of their Successors for ever, to the use of the Poor of the same place, and that Livery was made accordingly, and that the said *Died* was inrolled in the Chancery at Weston, and that afterwards the said Anne died, and that Jo. Bradley survived her and died, and that the Right of the said Messuage descended to the said Ra. as Cousin and Heir of the said Anne. And that Sir W. Allen Kt. was seised of a piece of Land in S. Dunst. aforesaid, containing 6 foot 4 inches contiguous and adjacent to the said Messuage, late the said Jo. Bradley's and Anne his wife, in his Demesne as of *fee*; And that the said Sir W. after the said Feoffment, and before the *Writ* purchased, utterly drew away the said Messuage, late the said Jo. Bradley's and Anne his wife, and erected a new House upon the Land of the said Sir W. and upon part of the Land upon which the other House stood, containing from the North to the South 13 foot, and from the East to the West 13 foot 10 inches, which Messuage is newly built, stood the day of the *Writ* purchased, and yet stands, &c. And if upon the whole matter the said Demise of the said Jo. Bradley and Anne be, and in Law ought to be adjudged the Demise of the said Messuage, newly built upon the said part of Land, where the Messuage of the said John Bradley and Anne stood, then, the Jury find that the said John Bradley demised to the said Thomas and John Allen the said House newly erected as aforesaid, as the Plaintiff hath alledged, and if not, then they find that he did not demise.

And

And upon this Verdict Judgment was given there, and an especial Writ of Habere facias scilicet awarded of the said Messuage, with the Appurtenances; viz. 18 feet of it from the North to the South, and 12 feet and an half of it from the East to the West; upon which a Writ of Error being brought in the Kings Bench, it was alledged for Error by Coke Sollicitor that upon this Verdict Judgment ought to have been given for the Tenant, and not for the Demandant, for what was remaining of that which was of the House, is not a House, but only a piece of a House, and therefore it ought to have been demanded by the name of a piece of Land, containing so much one way, and so much another; for a House wasted and utterly drawn away, cannot be demanded by a Messuage, but by the name of a Cottisage, or so much Land of such Content; for a Precipe lies of a piece of Land containing so many feet in length, and so many in breadth: And also Land built during the possession of him which hath it by Tort, cannot be demanded by the name of Land by him which hath Right, but by the name of a House, nor e contra, for every demand of Land ought to be made according to the nature of which it is at the time of the Action brought, be it a Messuage, Land, Meadow, Pasture, Wood, &c. And if the Walls of a House be made upon the Land without any covering, yet it shall be demanded but by the name of Land; for he said, that it cannot be a House without its perfection to be habitable, which he said is not here, because it stands upon the Land of the said Anne, which hath not the perfection of a House habitable without the Remnant. But this notwithstanding the first Judgment, was affirmed; for it was said by Popham, and other Justices, that, that which is erected upon the Land of the said Anne, shall be said a House as to the right of the Heir of the said Anne, for a House may be such to be demanded by the name of a House, albeit it hath not all the perfection of a House, as if it hath no Doors, so if it hath part of the Side-walls not made, drawn away, or fallen, yet the remainder continues to be demanded by the name of an House; so if part of the Covering be decayed, yet it shall be demanded by the name of an House, and the rather here, because with that which is upon the other Land it is a perfect House; and I may have a perfect House although the Side-walls belong to another: as in London, where a Man joyns his House to the Side-walls of his Neighbours, he hath a perfect House, and yet the Side-walls belong to another, and this commonly happens in London, but it is otherwise if it were never covered, or if the covering be utterly fallen, or blown away, for without a Covering a House cannot be said to be a House, for a Covering to keep a Man from the Storms and Tempests over head, is the principal thing belonging to a House.

And further, suppose that a Man hath a Kitchen, or a Hall upon Land, to which another hath right, he which hath right ought to demand it by the name of a House: suppose then that there is adjoining to this upon other Land a Parlor, a Buttery, a Shop, a Cloister, and the like, with Chambers over them, this doth not change the form of the Writ that he is to have which hath right, although before it was built by the name of a House, and yet as to the Rent both the one and the other was but a House, but as to the Demandant it is otherwise, for they are several, so here: And the Demise which before was made of the House drawn away, shall be now upon the matter a Demise, as to this part of it a new Messuage; for if a Man make a Lease for years of a House, and the Term pull it down, and erect there a new House, or if Land be demised, and the Lessee build a House upon it, in an Action of Waste, for Waste done in this new House, the Writ shall suppose that he did waste in the Houses, &c. which were demised to him, and yet in the one case it is not the Messuage which was demised to him, and in the other the House was not demised, but the Land only; But he hath no Term in the House but by the Demise before made: And it items to Popham, that Allen the Defendant cannot pull down this part of the House erected upon his own Land to the prejudice

of the house which Hayes demands, if this which is erected upon the Land of Allen be of such necessity, that without it the House of Hayes cannot stand for a Houle; but if he dies after that Hayes hath built it, that Hayes shall have an Action upon the Case against him for the damages which he sustained by it: As if a Man aggis with me that I shall set the outer Wall of my House upon his Land, and I do it accordingly, and afterwards the Party which grants me this Licence, breaketh it down, if the same were by Dado I shall have an Action of Covenane for it, and if he by Paral, yet I shall have an Action upon the Case against him. And here this being done by him which was then Owner and Possessor of the one and the other Land, it shall be taken as a Licence in Law, to the benefit of him which hath Right, which he cannot pull down after it is once made, but he shall be subject to Hayes his Action for it, or otherwise Hayes shall be at great mischief and prejudice by the Act of him which did the wrong, which the Law will not suffer, but rather shall turn this to the prejudice of him which did the wrong, than to the prejudice of the other which shall have wrong by the doing of it; for Volenti non fit injuria, As if I am to inclose betwixt my Neighbour and my self, and my Neighbour pull down this Inclosure or part of it, whereby my Cattle escape into the Land adjoyning, and depasture there, I shall be excused of this trespass in the same manner as if he had licensed me to have occupied it, and whatsoever happeneth to this Land adjoyning by my Neighbour's means, shall be in the same degree as my Neighbours Act, for what he does shall be to his own prejudice.

And upon the Judgment affirmed, the Attorney of the said Hayes made the like Writ of Habere facias scismam, directed to the Sheriffs of London, as was done in the Common Pleas, whereupon it was affirmed to the Court in Hillary Term next ensuing, that the Sheriff had made their Execution by the quantity of the feet comprised in the Writ, and that in the doing of it there was pulled down the part of another House of the said Allen which was erected two feet upon the Land of the said Anne, and proper Remedy for it, and that this Habere facias scismam varying from the thing recovered, might not be filed; To which it was said, that this quantity of feet was but a Surplusage in the Writ, and that the Writ before this was sufficient and warrantable by the Verdict and Judgment.

Sherry versus Richardson.

3. **I**n Debt upon an Obligation of 50 l. by Lawrence Sherry against Alexander Richardson, the Case was this; 16 Martii 33 Eliz. the said Richardson was bound to Sherry in 50 l. with condition to stand to and observe the Arbitrement, Award, Rule, Final End and Judgment of one Walter Bolton and Edward Price Arbitrators, indifferently elected to arbitrate, a witness, and judge of, and for all Actions, Suits, Quarrels, and Demands whatsoever betwixt them, until the date of the Obligation; so that it be made and done in Writing under their Hands and Seals, ready to be delivered to the Parties, at, or before the last day of this instant Month of April, and the said Arbitrators the last day of April, 33 Eliz. made an Arbitrement in Writing under their Hands and Seals, that within four days next ensuing the Award, either of the said Parties shall release each to other all Actions, Suits and Demands before the date of the said Obligation, with this Proviso, that if either of the said Parties shall be discontentsed with the said Award, or any part of it, within twenty days after the Award, that then upon the payment of 10 s. by the Party which thinks himself aggrieved with the Award, to the other, within the twenty days the Award should be void, and either of them to be at liberty against the other as before the Award; and by the whole Court, if the Award shall be said made within the time comprised in the

the Obligation, where the Proviso had been to be performed after the four days, it had been good, and a final Award, because that the Proviso to make the Award void after the time limited for making of Releases, is repugnant to that which was to be executed before, to wit, that either of them shall release each to other within four days; for every Award ought to be reasonable and indifferent betwixt the Parties in all appearance, and so that the one party of it ought not to impugn or encounter the other, and here to what purpose shall it be to make the Award void, and to put out at liberty against the other, when they have made Releases each to other, and what indifferency or reason should there be, that when one hath released, the other may dissolve the Arbitrement by the Proviso, and how may the Obligation which had been once forfeited by the not making of the Release within the four days be helped and become not forfeited by dissolving of the Arbitrement by the Proviso. But by Popham, Gaudy and Clench, if the Releases had been limited to have been made at a day to come, as ten days after, and that the Proviso had been to have been performed in the mean time before these ten days, then the Award had been void, because they had not pursued the submission, for it was no final end of the Controversie, in as much as it is not certain by reason of the Condition, whether it shall be an end or not: But it seems to Popham, that the Award here is not made within the time that it ought to have been made by the Condition, for the Obligation is alledged to be made the 16th. of March, 33 Eliz. and then no Month can be the instant Month but March, and therefore this word April is but a mere Negation, and if it should not be so, to what April shall it refer: for there is no matter to guide it more to one April than another, but the general Intendment which happily shall guide it to the next April, for avoiding of uncertainty, if it had not been for the words (this instant Month) and the words (within this Month) shall not be laid to be frivolous and vain, where they may have a good and plain Intendment, but rather the word (April) which is repugnant to it shall be laid to be void and a mere Negation; but it seems to him that as the Award is, the Case being that at any time within twenty days after the Award made, the one or the other disliking the Award, might have been defeated upon the payment of 10 s. if the same had been paid within four days, as it might have been, and before the Releases made, the Party by the intent of the Award had not been bound to have made the Releases, because that by it within the time before the Releases made, the Arbitrement shall be defeated by the Condition if it had been a good Award, and therefore it shall not be laid to be a final Award at the time of the Award made, because that instantly upon it, before the four days are passed, there was power in the said Parties to have defeated the Award upon the payment of the said 10 s. and therefore it seems to himself also that the Award was void, and by consequence the Plaintiff shall be barred.

6. King Richard the Third, by his Letters Patents granted to the Burgesses of Gloucester and to their Successors, that the Town of Gloucester &c. shall be a County of itself, several and distinct from the County of Gloucester for ever, and no part of that County and shall be called the County of the Town of Gloucester; nevertheless saving and reserving to himself and his Heirs, that the Justices of Assize in the County of Gloucester, the Justices of Goal-delivery, and of the Peace, in holding of their Sessions, and also the Sheriff of the County of Gloucester in holding of his County-Courts, and every of them may freely enter into the said Town, and keep the said Sessions and County-Courts, of, and for any thing and matter arising out of the said County of the Town aforesaid, and within the said County of Gloucester, as before time they had accustomed to hold them there, the said Grant by any other thing notwithstanding. And grants further, that they shall have a Mayor

Major, two Sheriffs, and one Recorder, within one same County of the Town of Gloucester, and that the Ministers of the Sheriff of the County shall not afterwards enter to do or execute any thing there which to their Office of Sheriff appertaineth, or any ways to intermeddle with it, except only for the Sheriff of the County of Gloucester, to hold their County-Courts as is aforesaid: And that the Major and Aldermen of the said Town for the time being, and their Successors, having Power and Authority to enquire, hear and determine all things which Justices of Peace, or Justices assigned to hear and determine Trespasses and Misdemeanors within the County of Gloucester before this time have made or exercised: And that the Justices of the Peace, of him, his Heirs, or Successors within the said County of Gloucester, should not intermeddle with the things or causes which belong to the Justices of Peace within the said Town, &c. And upon this Charter divers things were moved by Sir William Periam Knight, now Chief Baron of the Exchequer, before his going into the Circuit.

1. Whether, by the saving of the Charter they have sufficient power reserved to them to sit within the Town, being now exempted from the said Town of Gloucester; to enquire there of the Felonies done in the said County of Gloucester; And so for the Assizes and nisi prius taken there of things made in the County of Gloucester. Then if the Sheriffs may execute their Warrants made there at the time of the Assizes or Coal-delivery, notwithstanding the Exemption given to them by the Patent.

And it was agreed by all the Justices that the saving in the Patent is sufficient for the Justices of Assize and Coal-delivery to sit there for the things which happen within the County of Gloucester, for as the King may by his Letters Patents make a County, and exempt this from any other County, so may he in the making of it save and except to him and his Successors such part of the Jurisdiction or Privilege which the other County from which it is exempted, had in it before: As in divers places of the Realm, the Coal of a Town which is a County of it self, or which is a place privileged from the County, is the Coal of the County, and the place where the Assizes or Coal-delivery is holden, is within the County of the Town, and yet serve also for the County at large; as in the Sessions-Hall at Newgate, which serves as well for the County of Middlesex as for London, and yet it stands in London, but by usage it hath always been so, and nothing can be well prescribed unto by usage which cannot have a lawful beginning by Award or Grant, and this by the division of London from Middlesex at the beginning might be so. And so the Coal of Bury, &c. And although that the words are, saving to him and his Heirs, yet by the word (Heirs) it shall be taken for a perpetual saving, which shall go to his Successors, which is the Queen, and the rather because it is a saving for Justice to be done to the Subjects, which shall be taken as large as it can be: And albeit the express saving for the Sheriff is but for to hold his Court, yet in as much as the Authority of the Justices of Assize and Coal-delivery in holding their Sessions as before was accustomed, is saved, it is included in it, that all which appertain to the Execution of this Service, is also saved, or otherwise the saving shall be to little purpose: And therefore that the Sheriff, or other Minister made by the Authority of these Courts, is well made there and warranted by the Charter: And we ought the rather to make such Exposition of the Charter, because it hath been always after the Charter so put in Execution by all the Justices of Assize: But it seems that by this Commission for the County a thing which happens in the Town cannot be determined, albeit it be Felony committed in the Hall during the Sessions, but by a Commission for the Town it may.

Vide this Case
reported in
Coke, lib. 7. 12.
13.

Sir Francis Englefield Knight, being settled in his Demesne as of Fix, of the Manors of Englefield, in the County of Berks, and of divers other Lands in the first year of Queen Eliz. departed out of the Realm by Licence of the Queen for a time, and remained out of the Realm in the Parts beyond the Seas above the time of his Licence, whereby the Queen by her Warrant under her Privy Seal required him to return, upon which he was warned, but did not come, whereupon the Queen seized his Land for his Contempt; After which the Statute of Fugitives was made in the 13th year of the Queen, upon which by Commission found upon the Statute, all his Lands were newly seized, and afterwards, 17 Eliz. by Indenture made between him and Francis Englefield his Nephew, and sealed by the said Sir Francis at Rome, the said Sir Francis covenanted with his said Nephew, upon consideration of Advancement of his Nephew, and other god Considerations to raise an Issue, that he and his Heirs and all others seized of the said Manors, &c. shall hereafter stand seized of them to the use of himself for term of his life, without Impeachment of Waste, and afterwards to the use of his Nephew, and of the Heirs Males of his Body, and for default of such Issue, to the use of the right Heirs and Assigns of the said Francis the Nephew for ever, with a Proviso, that if the said Sir Francis shall have any Issue Male of his Body, that then all the said Uses and Limitations shall be void; and with a Proviso further, that if the said Sir Francis by himself or any other, shall at any time during his life deliver or tender to his said Nephew a Ring of Gold, to the intent to make the said Uses and Limitations void, that then the said Uses and Limitations shall be void, and that thereafter the said Manors, &c. shall be as before. Afterwards the said Francis was attainted of Treason supposed to be committed by him, 18 Eliz. A Lumures in partibus transmarinis, & le attaïnder fuit primement utlagary, & apres per act de Par. 28 Eliz. by which the Forfeiture of the Condition was given to the Queen, and at the same Parliament it was also enacted, that all and every Person or Persons, which had or claimed to have any Estate of Inheritance, Lease or Rent then not entered of Record, or certified into the Court of Exchequer, or, in, to, or out of any Manors, Lands, &c. by or under any Grant, Assurance or Conveyance whatsoever, had or made at any time after the beginning of the Reign of Her Majesty, by any Persons attainted of any Treasons mentioned in the said Act after the 8th day of February, 18 Eliz. Within two years next ensuing the last day of the Session of the said Parliament, shall openly shew in the said Court of Exchequer, or cause to be openly shewn there the same, his, or their Grant, Conveyance or Assurance, and there in the Term time in open Court, the same shall offer and exhibit, or upon his or their Oath affirming that they have not the same, nor can come by it, or that it was never put in writing, then the Effect thereof to be entered and enrolled of Record, or else every such Conveyance and Assurance shall be void and of none effect, to all intents and purposes; saving to every Person and Persons (other than to Parties and Priests) to such Conveyance and such as shall not exhibit the said Conveyance according to the true meaning of this Act all such Rights, &c. whereupon the said Francis the Nephew, the 20th day of November, 30 Eliz. in his own Person affirmed upon his Oath that he had not the said Conveyance, nor knew not how to come by it, but delivered the Effect of the Assurance, omitting the time when it was made, otherwise than that it was made after the beginning of the Queen's Reign, and before the Treason committed by the said Sir Francis, and before the Statute made 13 Eliz. against Fugitives, and omitting also the last clause of the Condition for the tender of the said Ring; and this he offered openly in the Court of Exchequer the same day: after which the Queen being moved with the said Condition, made a Warrant per Letters Patent under the great Seal, dated 17 Martii 31 Eliz. to Richard Broughton and

and Henry Bourchier Esquites, for her and in her place and stead, to deliver or tender to the said Francis the Nephew a Ring of Gold, to the intent to make void the Tales and Limitations limited by the said Indenture, and to return their Proceedings upon it unto the Court of Exchequer, whereupon they made a tender of a Ring of Gold to the said Francis the Nephew, the 18th day of March, 31 Eliz, which he refused to receive: And the two years after the said Session of Parliament was the 23d day of March, 31 Eliz. And the said Broughton and Bourchier returned all this that they had done as before, with the Commissions into the Exchequer, according to the Commission: And upon this at the Parliament holden 35 Eliz. upon an Act which then was to pass touching the Land and Attainder of the said Sir Francis, divers Questions were moved amongst all the Judges and Barons then there; whereof,

1. The first was, whether the effect of the Assurance made by Sir Francis was delivered into the Exchequer according to the intent of the Act, because it wanted the time when it was made, and also one of the Proviso's? And upon good deliberation they all did agree that it was not put in according to the purport of the said Act, for the time may be material to be known, for the fraud which by the same Statute might be adverted to be in the making of this Conveyance, and for the better tryal of the validity of the Assurance and of the cause of it, therefore the true effect thereof ought to be delivered or shewn in Writing to be entered of Record, because the Queens Council may see and understand by it whether the Queen might have Title to it, or not; and how can this be if it doth not appear when it was done? And for the Condition how can the Queen by presumption come to the notice of it, if it be not shewn to her? And this was one principal matter of the effect of the said assurance which ought to have been shewn, for this shewing ought to be for the benefit and advantage of the Queen, and not so much for the advantage of the Party. And here the effect of it which shall shew for the Queen is omitted, and therefore not shewn in writing according to the purport and intent of the Statute, which was, that by it the Queen and her Council may see what will make for her in the Grant, Conveyance or Assurance.

2. Whether this Condition were given to the Queen, because that the words in the Indenture precedent to the Condition, are these; viz. Because that the said Francis the Nephew might happen to be of evil Behaviour and Government; the said Sir Francis provided as before, which (as was alledged) was founded upon a particular regard and respect, which was proper to himself, and therefore cannot be transferred to the Queen; and it doth not appear that he yet had been of ill behaviour: But this notwithstanding, all agreed that this Condition is in the Queen by the Attainder of the said Sir Francis, as well by the Act of his Attainder, as by the Act of 33 H. 8. which give the forfeiture of Conditions also expressly in the case of Treason.

3. Whether there ought to be an Office for finding the performance of the Condition according to the Warrant, and all agreed that there need not, because that when any Man is to do a thing by Warrant of Letters Patents for the Queen, to be returned in any Court, it sufficeth for him to return it, which he hath done according to the Letters Patents, with the Warrant it self, and then that which is so returned, is as well of Record as if it were found by Office and returned of Record; and so it was agreed in the Exchequer, about 16 Eliz. in the Case of Edward Dacres, who had made an Assignment of his Goods and Chattels to Sir Alexander Culpepper and others, who afterwards was attainted of Treason by Outlawry, and the Condition adjudged to be forfeited to the Queen by the Statute of 33 H. 8. and a Warrant was made by Letters Patents to Sir Thomas George to perform the Condition, who did it, and returned that he had done it accordingly, whereby the Assurance to the said Sir Alexander and his Companions was avoided, and all the Goods and Chattels of the said Edward forfeited to

the Queen, and all this was in the Queen without Office found, for that which the Sheriff or other Minister doth by virtue of any Writ or Warrant which is to be of Record, when it is returned of Record, it is as well of Record as the Writ or Warrant it self, so here, &c.

4. But the greatest question was (which was not any thing in the case here) whether the Estate made to Francis the Nephew were void, eo instanti upon Hillary Term finished 31 Eliz. although the two years after the Session of Parliament, 28 Eliz. did not end until the 28th day of March, 31 Eliz. In as much as no Term was or could be within two years after it, in which the assurance or the effect of it might be shewn openly in the Court of Exchequer, or that it shall carry to be void until the two years are fully expired ; as if a Man make Assurance of his Land upon condition, that if he do not go to Rome within two years next ensuing, that it shall be to the use of I. S. and his Heirs, and he stay unel a week within the end of the two years, in so much as it is not possible to perform it within the two years, yet the use doth not change until the two years are past ; but in this case it ought to be shewn a Term within the two years, which is as much as to say, that if the Terms be all past, so as it cannot be done after it within the two years, the Assurance eo instanti upon the finishing of the last Term is become void ; as if an Assurance be upon condition, that if in the Term time, within two years he do not levy a Fine to I. S. and his Heirs, &c. now if the last Term pass without the Fine, the Use change, albeit the two years be not expired ; si Parolls font Plea : And there is great diversity where an Estate is to be defeated, or an Use is to be raised upon an Act to be done, or not done, within a time certain, within two years, and where within two years generally, for in the first case the Use change upon the Act done, or not done immediately, and in the other not until the two years are finished, because that by presumption always within two years the Act may be done for any thing of which the Law takes cognizance. But if the Act to be done, or not done, refer to any time certain within the two years, as if he do not pay 10 l. to one before the Feast of St. Michael the Arch-Angel within the two years, that then the Use shall change, or the Estate shall be void, in these cases immediately upon the last Feast of St. Michael the Arch-Angel, within the two years the Use change, or the Estate shall be void, as the case is, and shall not carry until the full end of the two years to do it, for in the words themselves the diversity appeareth.

8. At the same time there was another Indenture shewn to the said Judges, bearing date the 4th day of May, 1 Eliz. made between the said Sir Francis Englefield of the one part : And Sir Edward Fitton, and Sir Ralph Egerton Knights, of the other part, and enrolled in the Exchequer, according to the Statute, of the 30th day of October, 30 Eliz. by which the said Francis for him and his Heirs covenanted with them, that as well in consideration of a Marriage had and solemnised between John Englefield, Brother of the said Sir Francis and Margaret Fitton, Sister to the said Sir Edward, and for the augmentation and Interest of the Joynure of the said Margaret, as for other good causes and reasonable considerations, the said Sir Francis especially moving, the said Sir Francis before the Feast of St. John Baptist, then next ensuing, would affre Lands within the County of Warwick, of the value of 60 l. a year to the said Sir Edward and Sir Ralph, and their Heirs, to the use of the said Margaret for her life, and for her Joynure, for part of it, and for the Remainder that shall also be to the use of the said Margaret for her life, in case that the Lady Anne then the Wife of the said Sir Francis, should recover her Dowry of the said 60 l. a year.

And the said Sir Francis for him and his Heirs, did further covenant with the said Sir Edward and Sir Ralph, that if it should happen that the said Sir Francis

Francis shall die without Issue Male of his Body, the said John or any Issue of his Body upon the Body of the said Margaret begotten then living, that then after the death of the said Sir Francis, as well the Maner of Englefield, as all his other Lands (making especial mention of them) should be and might descend, remain, revere, continue or be in possession or reversion to the said John Englefield, and to the Heires Males of his Body upon the Body of the said Margaret lawfully begotten, if the said John were then living, or to the Heires Males of the Body of the said John upon the Body of the said Margaret lawfully begotten, without any Act or Acts, Thing or Things made, or to be made to the said Sir Francis to the contrary thereof.

And upon this, it was moved, that there was a variance between this Deed now shewn, and this Indenture, and that therefore it doth not appear, whether this Deed was then in the Court or delivered there according to the Statute thereof made 28 Eliz. for in the Deed it is (for other good causes) and this word (good) is not comprised within the Indenture.

But as to it, all the Judges and Barons agreed, that albeit these defects hapned by the negligence of the Clerk in writing and examining, this Indenture remains good, in as much as the omissions are in matters and words which are of abundance, and not in that which is any substance of the Deed.

But the Lords of Parliament which were Committees of this Case in the Parliament, sent for the Record of the said Indenture, and would have had this to have been amended in the Chamber next to the Parliament; but as the Officer was in doing of it, the Judges availed that it should not be done, as well because this was not the place where it ought to be amended, but the Court of Exchequer if it were, or needed to be amended: And also because that the two years after the Session of Parliament of 28 Eliz. was then past.

Then it was moved whether by the Covenant and Considerations aforesaid, the Use shall pass or were raised to John Englefield, or now to his Son Francis, Nephew to the said Sir Francis, and begotten upon the Body of the said Margaret. And all agreed that it is not for divers reasons.

1. Because it is, that if it happen that Sir Francis die without Issue Male, that then it shall be to John as before, if he be then living, or to the Heires Males of his Body as before, which is in the disjunctive, to wit, that it shall remain to John, or to his Heires Males of his Body, which cannot raise any Use, but sound only in Covenant for the Incertainty, and alio it is upon a future Contingent, to wit, if the said John be then living.

2. Because the Covenant is, that it shall come or descend, &c. in the disjunctive, and if he had covenanted that it shall descend to John after his death without Issue Male, it had been clear that no Use had been raised by it, for it shall be but a mere Covenant, to wit, that he shall leave it to descend to him; and here it being in the Disjunctive it cannot be any other than a bare Covenant, to wit, that he shall suffer it to descend, or otherwise by Conveyance to come to John, after his death without Issue Male, the one, or the other at his pleasure.

And yet further, that it shall descend, come or remain to John in Possession or Reversion, so that he may make the one or the other void at his pleasure, which cannot be, if an Use shall be raised by it, and therefore also it ensues but a bare Covenant, whiche he may perform either the one or the other way as his pleasure.

Also it is, that it should so descend or come to John without any act or thing done or to be done by him to the contrary, whereby also it fully appeareth, that the Assurance of the said John shall stand for all this Land upon the Covenant, and not upon any Use which was to be altered and changed by it.

But if an Use may change by the Manner upon the consideration, yet it shall not change to the said John or his Issues, until the death of the said Sir Francis without Issue spale, because that unel that happen, if the said John had been living, he had not had any Use, because it is that he shall have the Land then if he be then living, and if it shall not be in him until this time, it shall not be in his Son until Sir Francis be dead without Issue; for it is if the said John or any Issue male of his Body, &c. be then living, then it shall descend, come or remain, &c. so that it doth not come to them until it may appear whether the said John, or any Issue male of his Body upon the Body of the said Margaret, be in rerum natura, when Sir Francis shall be dead without Issue male, and therefore it yet remains upon a Contingent, whether the Use shall be to the Heirs males of the Body of the said John, if it shall be said that it is an Use, and therefore in the mean time the entire Fee-Simple remains in Sir Francis, not yet changed, but for the Estate Tail it self in himself, if any change shall be, as appeareth before that it shall not be, and therefore by the Attainder of the said Sir Francis, the whole Fee-Simple is now all forfeited to the Queen, before that the Use may be to the Heirs males of the Body of the said John: And the Queen shall not come to this Land in any Privity by the said Sir Francis, but in the Post by the Escheat, and therefore the Possession of the Queen now, or of her Patents shall never be changed with this Use, which shall never be carried out of any other Possession but such which remaineth in Privity until the Use is to come in Esse, no more now than as it might at Common Law before the Statute of Uses, 27 H. 8. And this as to the future Use was the opinion of Popham, and some other of the Justices. And nota 21 H. 7. placito 30. If a man covenant in consideration of the Marriage of his Son, that immediately after his death his Land shall revert, remain or descend to his Son, to him and the Heirs of his Body, or to him and his Heirs for ever, that this is but a bare Covenant, and doth not change any Use. And what diversity then is there in the Case of Sir Francis Englefield, who covenants that it shall descend or remain in Possession, or Revert. And as it seems the great difficulty which was in the Case of Sir Robert Constable, which was put by Gerard Attorney-general, 6 Eliz. and it appeareth in Dyer, 1 Mar. was because that the Covenant was, that it shall be to the Son in Possession or Use, which for the uncertainty in as much as it was in them to leave the one or the other, or perhaps the Estate of their Land was such, that part was in Possession and part in Use, and therefore according to the intent taken rather for a Covenant than for matter sufficient to change the Use: But it was so that it was never helped by any Right which he had, but by the Grace of the Queen he enjoyed it.

Easter Term, 35 Eliz.

Crocker and York versus Dormer.

1. **U**pon a Recovery had by John Crocker and George York, against Geoffrey Dormer, in a Writ of Entry in the Post, of the Manors of Farningho, with the Appurtenances, and of Sir Melluages, Sir Cottages, &c. in Farningho, and of a yearly Rent or Pension of four Marks issuing out of the Church or Rectory of Farningho, and of the Advowson of the Church of Farningho, in the County of Northampton, William Dormer Son and Heir of the said Geoffrey, brought a Writ of Error, and assigned divers Errors.

1. Because that such a form of Writ doth not lye of an Advowson, but only a Right of Advowson, Dartien prelement and Quare impedie.
2. Because he demands the Advowson of the Rectory, and also a Rent issuing out of the same Rectory.

3. Es-

3. Because the Demand for the Rent is in the Disjunctive, to wit, a Rent or a Pension.

4. Because it is a Pension, whereas a Pension is not sueable in our Law, but in the Spiritual Court; to which Gaudy said, that there is a great diversity between a common Recovery, which is an Assurance between Parties and a Recovery which is upon Title; for a common Recovery is to an Use, to wit, to the use of him against whom it is had, if no other Use can be averred, and therefore as to the Use, it is to be guided according to the intent of the Parties, and by a common Recovery had against Tenant for life, he in the Reversion if he be not party or privy to it, may enter for a Forfeiture, as it was adjudged very lately in the Exchequer, by the Advice of all the Justices in the case of a Recovery had against Sir William Petham Knight, and in all these things it is otherwise in case of a Recovery upon Title, and therefore in as much as this common Recovery is but a common Assurance between Parties, and is always by Assent between Parties, to the end that they may make Assurance from one to another, there shall be and always hath been a contrary Exposition to a Recovery which is by pretence of Title, and it hath been common to put in such Recoveries, Abbowsions, Commons, Warrens, and the like, and yet always allowed: And if this shall be now drawn in question, infinite Assurances shall by this be endangered, which the Law will not suffer, and therefore the demand of an Abbowlon and Pension in the Writ of Entry makes not the Writ vicious, as it shall do in another Writ of Entry founded upon a Title and not upon an Assurance. And as to that, that the Rent and the Abbowlon also is demanded, this is good, because the Abbowlon is another thing than the Rectory it self, out of which the Rent is demanded to be issuing: And soz the disjunctive demand of the Rent or Pension, it makes no matter in this Case, because it is a common Recovery in which such a precise form is not necessary to be used as in other Writs, and also a Pension issuing out of a Rectory is the same wch the Rent: To which Clench and Fennor agreed in all; but Popham moved that the greatest difficulty in this case is the Demand made in the Disjunctive, to wit, of the Annual Rent or Pension, for if a Pension issuing out of a Rectory shall be laid to be a thing merely spiritual, and not to be demanded by our Law, or merely of another nature than the Rent it self, with which it is conjoyned by the word (or) then it is erroneous; for albeit a common Recovery, be now a common Assurance of Land past by the Assent of Parties, and therefore hath another Conservation, than that which passeth by pretence of Title, yet we are not to omit gross Absurdities in such common Recoveries, as to demand an Acre of Land or Wood in the Manors of Sale, or Dale, or Black-acre, or White-acre, these are not good in common Recoveries, because there is no certainty in the demand which of them the Party is to recover, which kind of Absurdity is not to be admitted in these Recoveries; for this is but a mere ignorance in the Law and the Ministers of it. And to this Gaudy and the other Justices agreed, but they said, that a Pension issuing and a Rent shall be taken for all one; for if a Man grant a Pension of 20 s. a year, issuing out of the Manors of D. or of the Rectory of S. these are Rents issuing out of them: and if the Demand had been of an Annual Rent, or Annuity of 20 s. a year issuing out of the Rectory, this had been good. To which Popham agreed, and yet said, if it had been an Annual Rent of 20 s. &c. or of an Annuity of 20 s. it had not been good, because that the word (issuing) is not referred to the Annuity, but to the Rent only, and therefore are merely general, and not as the same, but if the Demand were of an Annuity, Rent, or Payment of 20 s. issuing out of a Rectory, it is good, for this is but one and the same. Then it was alledged that notwithstanding that which appears to the Court, it cannot be taken that this was a common Recovery, for upon the Assignment of the Error, it is not averred that it was a common Recovery

very, to which Popham said, that common Recoveries are such common Assurances to all Persons that are well known to all, and especially to us that they need not be averred, for they are known by certain Marks, to wit, by the voluntary Entry into the Warranty, the common Voucher and the like: And at last they all agreed that the Judgment shall be affirmed.

2. In Waste, by Thomas Haydock against Richard Warnford, the Case was this; One Michael Dennis was seised in his Demesne as of Fee, of the third part of a Messuage, and of certain Lands in Bury Blunsden in the County of Wilts, and being so seised the last of April, 9 Eliz. demised them to Susan Warnford for forty one years, from the Feast of St. Michael the Arch-Angel then next ensuing, who assigned this over to Richard Warnford, after which the said Michael Dennis by Bargain and Sale enrolled, according to the Statute, conveyed the Reversion to John Simborn Esquire, and his Heirs, the said John being then seised of another third part thereof in his Demesne as of Fee, after which, to wit, the first day of June, 17 Eliz. the said John Simborn demised the said third part, which was his before his said Purchase to the said Richard Warnford for twenty one years then next ensuing, and afterwards the said John Simborn died seised of the Reversion of the said two parts, and this descended to Barnaby Simborn his Son and next Heir, who the 20th of June, 28 Eliz. by Bargain and Sale enrolled, according to the Statute, conveyed the Reversion of the said two parts to the said Thomas Haydock and his Heirs, after which the said Richard Warnford committed Waste in the said House, whereupon the said Thomas Haydock brought an Action of Waste against him, according to the said two several Tales, and assigned the Waste in suffering the Hall of price of 20 l. a Hitchin of price of 20 l. and so of other things to be uncovered, whereby the great Timber of them became rotten, and so became ruinous, to the disinheritance of the Plaintiff, and upon a Nihil Dicit, a Writ was awarded to enquire of Damages, in which it was comprised that the Sheriff shall go to the place wasted, and there enquire of the said Damages, who returned an Inquisition taken thereof at Bury Blunsden, without making mention that he went to the place wasted, and that it was taken there, whereupon Judgment was given in the Common Bench, that the said Plaintiff shall recover his Seisin against the Defendant of the said places wasted, with their Appurtenances Per visum Jurator. Inquisitionis praedit. & damna sua occasione vasti in eisdem locis in triplo secundum formam statuti, &c. And upon this a Writ of Error was brought in the King's Bench, and there by all the Justices it was agreed that it was but Surplusage to comprehend the Writ of Enquiry of Damages, that the Sheriff shall go to the place wasted, and there enquire of the Damages, in as much as by the not denying thereof the Waste is acknowledged, and therefore he need not go to the place wasted: But where a Writ is awarded to enquire of the Waste upon Default made at the Grand Distress, there by the Statute of West. 2. cap. 24. the Sheriff ought to go in Person to the place wasted, and enquire of the Waste done, and therefore in that Case it is needful to have the Clause in it, that the Sheriff shall go to the place wasted, and there enquire of it: for by the view the Waste may be the better known to them, but where the Waste is acknowledged, as here, that Clause need not, and albeit it be comprehended in the Writ, yet the Sheriff is not thereby bound to go to the place wasted, and to enquire there, but he may do it at any place within his Bayliwick where he will, and therefore it is no Error in this point: And they agreed also that the Waste is well assigned in the entire Hall, &c. although the Action were brought but upon the Demises of two third parts of it, and it cannot be done in these parts, but that it is done in the whole, and also it cannot be done in the whole, but that it is also done in the three parts, but yet the doing thereof is not to the Dis-inheritance of the Plaintiff, but in these two third parts; and therefore no Error in this manner of assigning of

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the Waste. And they also agreed that the Action is well brought upon these several Demises, because neither the Interest of the Term, nor of the Inheritance was severed nor divided to several Persons at the time of the doing of the Waste, but the two Terms in the one, to wit, in Wansford, and the Inheritance of these immediately in the other, to wit, in Haydock; And by Popham also, the thing in which the Waste is assigned, is one and the same thing, and not divers, to wit, a Pessuage, and therefore by Bradwell and Pollard, 14 H. 8. 10. if several Demises are made of one and the same Pessuage by one and the same Person, as one part at one time, and another part at another, an Action of Waste may well lie: Albeit Fitzherbert and Brook seem therein to be of a contrary Opinion, and that several Actions of Waste ought to be in that Case.

And the Exception was taken, because the Judgment was entered that he shall recover the place wasted, *Per visum Jurator. predict.* whereas they had not the view of it in this Case, for this should be where it is given upon a Writ awarded to enquire of the Waste upon default made at the grand Distress; whereas here the Waste is not denied but acknowledged.

But as to this several Precedents were shewn, the one upon Demurrer for part, Hill. 1 Mariae, Rot. 301. and another, Trin. 31 H. 8. Rot. 142. in an Information, in both which Cases the Judgment was entered as here, to wit, *Per visum Jur. predict.* and yet in these, the Waste was acknowledged: Whereupon it was ordered that the Judgment should be affirmed.

3. In an Ejecctione summe brought by Sir Moyle Finch Knight, Plaintiff, against John Risley Defendant, for a Pessuage and a Mill in Ravelston in the County of Buckinghamshire, the Case for the matter in Law appeared shortly to be this.

The King and Queen Philip and Mary by their Letters Patents, dated the eighth of July, 3. & 4. of their Reign, made a Lease of the Reversion of the Mannor of Ravelston (of which this was parcel) to Sir Robert Throgmorton for seventy years, from such a Feast, after the death of the Countess of Ormond, who then had it for her life, rendering yearly 73 l. 13 s. payable at the Feasts of Saint Michael the Arch-Angel, and the Annunciation of our Lady, at the Receipt of the Exchequer by equal Portions, with a Proviso that the Lease shall cease, if the said Rent or any part thereof were arrear, and not paid at the said Feast, or a certain time after, the Reversion descend to the now Queen, and the said Countess died 7 Eliz. part of the Rent then payable, was not paid at the day, nor within the time limited by the Proviso, afterwards Queen Elizabeth by her Letters Patents, dated 30 May, 30 Eliz. granted the said Mannor to the said Sir Moyle, and one Awdeley and their Heirs in Fee, with a Clause in it, that the Letters Patents shall be good notwithstanding there be not any Recital of any Leases or Grants at any time before that made by her, or any of her Progenitors; after which an Office is found for the Queen, that the Rent was arrear and not paid as before, after which the said Sir Moyle and Awdeley assured the said Mannors by Bargain and Sale to Sir Thomas Hennage who dismissed the said Pessuage and Mill to the said Sir Moyle, upon whom the said Risley entered in Right of the said Lease made by the said King Philip and Queen Mary, under Thomas Throgmorton, who then pretended to have the Term of the said Lease from Sir Robert his Father. The Case was well argued at the Bar, and now at the Bench, where Fennor moved first, Whether it were a Condition. 2. Whether an Office were requisite. 3. Whether this Office found, comes soon enough for time: For the first he conceived that it was a Conditional Limitation, for a Limitation is that which limits an Estate certain or doubtful, as *Quamdiu in manibus nostris fore contigerit, quamdiu amicus sit, or dummodo solverit:* And there (dummodo) was

was a Condition as appeared, 5 Ass. pl. 9. & 2 Ass. a Grant made to J. S. and his Heirs tunc diu, as the Grantez and his Heirs shall enjoy such a Possessio[n], this is a Limitacion, and a Limitacion always determines the Estate, but a Condition, albeit it be broken during the Estate, yet it doth not determine the Estate, and so it is of a conditional Limitacion, and therefore it is not in the King until an Office be thereto found, for the King submits himself to the Law, for Bracton saith, *Quod non debet judicare sed secundum legem*, and his Prerogative is so excellent, that he cannot take a part with any thing, but by matter of Record, neither can he have the Right or Possession of any one in question upon a bare surmise, but by Office or other matter of Record, for a Record always carries Credit with it. And there is no diversity where two matters are limited in Dead, and where one is limited in a Dead, and the other by the Law: And the contrary Objections are easily answered, for when the Tenant in Tail of the King dies without Issue, it is in the King without Office, because the Law does not help them which contemps it. But in case of an Office which is forfeited, it is in the King to dispose without Office, because the King is not to have the Office it self but the Disposition of it, and yet it is to be defeated by *Scire facias in the Chancery*.

If a Mill be demised for life, upon condition that he shall not let it but to a Miller, and he breaks the Condition, in Case of the King there must be an Office to avoid it, and there the Office entitles the King to the Condition and not to the Entry, for after the Office it is not in the King until Entry: And here the Rent may be paid to the King's Bailiff in the Country, which is matter of law, and therefore shall not be defeated without Office; And here the Office comes in late to give any advantage to the Patentee, for the King cannot grant a Title of Entry before Office, no more than the Abiture of a common Person can take advantage of a Condition broken in the time of the Grantez, of which the Grantez did not take advantage in his time: And if the Queen makes a Lease durante beneplacito, the Patentee shall not avoid it, as it appears in the Lord Burleigh's Case, and therefore the Office here shall not help the Patentee, but the Queen for the mean Profits: for although nullum tempus occurrit Regi, yet the Patentee shall not take advantage of this Prerogative.

Clench agreed clearly, that it was a Limitacion, but yet that it is at the Queens liberty to avoid or make it good, for perhaps the Rent is better than the value of the Land, and upon this reason a Lease from the King probris hominibus de Dale, or to a Monk rendering Rent, is good, which otherwise had been merely void: And by the Office found, the Election of the Queen appears, without which the Lease is to continue, and therefore the Patentee shall not defeat that which happened in the Queens time before.

Popham, To say that the Office helps the Queen for the mean Profits, and that now the Patentee shall not take advantage to avoid the Lease is to absurd, for the Queen cannot take advantage to have the mean Profits, but in respect of the Avoidance of the Lease: And if the Lease were made void or determined against the Queen, it shall not remain good and of force against the Patentee, and also to say, that the Lease might have its continuance, after that it is determined by the Limitacion comprehended in the Writing, by reason of a Reservation, is also to absurd, for so it may be laid, that if the Queen make a Lease for years, if J. S. shall live so long rendering Rent, that this Lease may have Continuance after the death of J. S. which clearly is not Law: and the Patentee here shall take the advantage to avoid the Lease happened before his Patent made, because that no Office need to be found of the non Payment before it passed from the Queen to make it void, and the reason is, because this Proviso (as it is penned) is a mere Limitacion of the Estate, and not any manner of Condition; and therefore if the Queen make

make a Lease for an hundred years, if the Lessor shall so long lawfully pay the Rent reserved at the day of Payment, if he fail of Payment of the Rent reserved at the day limited, the Lease is ipso facto determined, and it need not be found by Office. And what diversity is there where the Limitation is conjoined to the Estate it self, and where it cometh in by a Proviso afterwards, all being in one and the same Deed, and therefore spoken at one and the same time, for the one and the other Case manifesteth that the Contract and Agreement is, that the Lease shall not continue longer than the Default of the Payment of the Rent.

And in this case, suppose that the Queen had granted over the Land : shall not the Patentee have advantage to avoid the Lease, because that one Office was found before ? It is clear that he shall, or otherwise this is now become to be an absolute Lease for an hundred years, which is not Law, for it is miserly contrary to the Contract, and therefore absurd to be maintained : I agree with the general Rule that nothing shall pass to, or from the Queen but by matter of Record ; but this makes nothing against me in this Case, for here the same Record which passeth the Estate to the Party, to wit, the Patent of the Lease contains the time how long it shall endure, longer than which it cannot continue : And therefore by 9 H. 7. If the King makes a Gift in Tail, and the Donee dies without Issue, the Land is in the King without Office, so in every other Case where the Estate is determined according to the Limitation, for he cannot be put out of Possession wrongfully, and now hath right to hold it against him. And I say that no Warrant or Authority can be found throughout the whole Law where a Lease or Estate made by the King is determined by an express Limitation comprised in the Patent it self of the Grant, that there need not any Office or other thing to determine it, for that which is comprised in the same Patent may determine it, of it self.

And further, whereas the Proviso is, that the Re-entry shall be for Default of Payment of the Rent, and the like, where the Term continues until the Re-entry be made, notwithstanding the Condition be broken, as appeareth by all the Justices, 28 H. 8. because it is expressly limited that it shall be defeated by the Re-entry, and therefore before Re-entry be made, the Action of Waste shall be, quod tenet : And by 12 H. 7. where a common Person is put to his Entry, there the Queen is put to an Office, with which agrees Starnford in his Book of Prerogative : But in this Case, if it were between common Persons, the Lease shall be determined upon Default of Payment of the Rent, and before any Re-entry, and therefore in the Queens Case it shall be determined without Office. But if the Case had been, that if the Rent had been Arrear and not paid, that then upon Re-entry made, it ought to cease, there an Office had been necessary to counterbalance the Entry in Case of the Queen, or otherwise the Lease shall not cease, because the Queen cannot make an Entry but by such means, and therefore it ought to be by matter comprised in the Patent. It hath been said, that this shall be a conditional Limitation, and that therefore an Office is necessary ; But I say, that here is not any matter or quality of a Condition, but miserly of a Limitation, and it is rather a contingent Limitation than any manner of Condition, and this is well proved by 11 H. 7. which is, that the Grantor of a Reversion shall take advantage of it at common Law, the which he cannot do if it favour any way of a Condition, and by 27 H. 8. a Proviso in a Deed ought always to be expounded according to the purpose, because that it is placed in a Deed, sometimes for a Condition, as where a Proviso is that the Lessor shall not alien ; sometimes for an Exception, as where a Proviso is, that the Lease shall not extend to such an Acre, or such a thing, sometimes for a Limitation, as here and in the like Cases. And in this Case the Release of the Rent shall make it, that the Lease shall never be determined for the non Payment of it, because that afterwards there cannot be any such Default of Payment, and therefore in such a Case the Limitation remaineth

maineth absolute and discharged of the Contingent, which otherwise had determined it : As if a Man make a Lease for an hundred years, if the Lessor in the mean time do not cut such a Tree, a Release of all Conditions will not serve, yet if the Lessor himself or any other but the Lessor cut it, the Lease is become absolute for an hundred years : And so upon this point my conceit appeareth But the most colourable thing which hath been alledged on the other side, was by my Brother Drew, which was, that in counting upon an Ejec*tione huius*, and pleading in such a Lease as here, it shall be as an absolute Lease for the years comprised in the Habendum, without making any mention of the Proviso, upon which he enforced it that it shall be taken to be of more efficacy than if it stood merely upon the Contingent ; for he said, that upon a Lease made for years, if the Lessor shall so long live, and the like, in the Count, and also in the pleading mention ought to be made of the life of the Lessor ; I agree it to be true that the pleading shall be so, for in Count counting, and in Plea pleading, if the matter of the Contingent precede the Limitation, or be annexed to the Limitation, there a Man ought to speak to the Contingent, or otherwise it is not good, as by 14 H. 8. it shall be of a Condition where it is precedent ; But in case of a Condition it is quite otherwise, for if a Man make a Lease to another for years, Si tardiu vixerit, or Dummodo solverit, &c. or the like, which are annexed to the Limitation of the Estate ; in all these Cases in Counting and also in Pleading, he ought to aver the life of the Lessor, or otherwise the Concerns of the thing according to the Limitation : But where that which was the Limitation cometh by a Proviso, after the Habendum which distinguisheth the Sentence as here, there, because it is a matter distinct and subsequent from the Habendum, and not annexed to it, he need not to speak of it, but there it shall always come in to be shewn of the other part, and this is the usual and common Case of difference for pleading, but this makes no difference of the Estate ; And therefore if an Obligation be made with a Condition endorsed, the Plaintiff in Debt upon it doth not speak of the Condition in his Count, but if the Condition be precedent, or Lands comprised within the body of the Obligation, then he ought to speak of it in his Count, as appeareth by 28 H. 8. where a Man was bound in twenty Quarters of Salt, to be paid at such a day, and if he fail, that he shall pay forty Quarters at such a day, if he demand the forty Quarters in his Count, he ought to shew the default of payment of the twenty Quarters at the day limited for it, and yet the Condition that is out of, and that which is comprehended within the Obligation are but as one for the substance, but for the form it differs as to the pleading, which form ought to be observed.

Another reason is in this case, because that the Payment of the Rent is limited to be made at the Receipt of the Exchequer, in which case if it had been paid, the Payment had been entered of Record, and not being so, the Default appeareth of Record, and where the Default appeareth of Record, there needs no Office, for it shall be in vain to make that to appear upon Record by Office, which otherwise appeareth of it self by Record, and therefore in 4 and 5 of Philip & Mary it appeareth, where Sir John Savage was Sheriff of the County of W. in Fex, and that he was indicted of two several voluntary Escapes of Felons, and for not keeping of his Turn in loco consueto upon two Indictments remitted into the Kings Bench in 8 H. 8. upon the motion of the Attorney-general the Office was seized into the Kings hand without Scire facias, or any Inquisition found thereof, and as appeareth, 3 Eliz. One Blake who by Patent was the King's Remembrancer in the Exchequer being made one of the Barons of the same Exchequer, the other Office was ipso facto gone and determined, and there need no Inquisition to be made of it, nor Scire facias to avoid it, because the taking of the Office of a Baron is of Record ; And a Man cannot be a Judge and a Minister in one and the same Court, and therefore the first Office is determined by taking of the second, and there need no

no Office to be found of it, the matter it self being apparent upon Record and therefore as it appeareth it was adjudged in 13 H. 8. that a new Patent of the same Office of Remembrancer making recital of the former Patent (which appeared as before upon Record to be void) with a Clause Quod post mortem five determinationem, &c. thereof, the new Grant shall take effect, was void. And Englefield's Case was lately adjudged in the Exchequer (and at the Parliament 35 Eliz. allowed to be good Law by all the Justices there being) where the Queen had a Condition given to her by Forfeiture upon an Attainder of Reason to be performed by the payment of a sum of Money, or the like: If the Queen makes a Warrant by Patent to one to perform the Condition, and to return his Proceedings thereupon into the Exchequer, who performs it accordingly, and thereupon returns all that he hath done with his Warrant into the Exchequer, no Office need to be found of the performance of the Condition, because that by the Return (which is warranted by the Patent) the Condition appeareth sufficiently upon Record to be performed, and therefore no Office need to be found, no more of the Non-payment in this case. It hath been laid by some, that it may be that the Patentee hath tendered the Rent at the Receipt, and that they would not receive or record the Receipt of it, and that then it should be held that he should lose his Lease, no Default being in him: to which I say, suppose a Man be bound to make his Appearance in any of the King's Courts, may he say, that he appeared there according to the Obligation, and excuse himself by such bare Averment thereof, unless his Appearance be entered of Record? It is clear that he cannot, as appeareth by 18 E. 4. for Appearance in a Court of Record, is not unless it be of Record, yet it may be laid, that then the Case may be had to the Party: As if the Officer will not record his Appearance, which is the same mischief as in this Case, but this will not help him, for first the Law presumes that every Officer will be indifferent between Party and Party; and upon this Opinion had of him he is admitted to his Office, whereupon the Law presumes that if the Party would have appeared, that the Officer would have recorded it, and in as much as he did not do it, it shall be taken that he did not appear. But the strongest reason in the Case is this, to wit, if Default be not in the Party to do that which he ought to do, but in the Officer to do that which belongeth to his Office, as to record that which he ought to record, there the Officer shall be chargeable to the Party in an Action upon the Case, to answer him so much in Damages as he hath sustained by such default of the Officer, and the Law will put the Party rather to such a Recovery than to answer it by a bare matter of Averment which ought to be of Record. And further such a voluntary default may be a Forfeiture of his Office, and so a sufficient Penalty in case of an Officer. And to say, that the Office of Receipt is not an Office of Record, is too absurd, for it is a principal member and part of the Court of Exchequer, and as well of Record, for the matters belonging to it, as the Offices of the Pipe and Remembrancers are for those things which belong to them, and the Records of Receipt as well enrolled in Rolls of Parchment as any other Records of the Queen in this, or any other Court, and it is commonly used now to convey Reversions and Remainders to the Queen, with a Proviso to be void upon payment of a certain sum of Money to the Queen at the Receipt of the Exchequer, and it is as usual upon Payment made there to have it back again without Office found of this Payment; and what is the reason of it? now, but because the Payment there is always entered upon Record, and therefore no Office needs make this Payment to appear upon Record. And for the Case of Sir Robert Chelten, 4 Eliz. there is great diversity between that and this Case, for it is ordained by the Act that upon default of Payment (which is not limited there to be made at the Receipt) the Office shall be forfeited, and not that the Estate in the Office shall cease: And of a thing forfeited it is at the Election of him who is to take advantage of the Forfeiture, whether

he will take it or not, and till the advantage taken thereof the Party still remains an Officer.

And therefore if the Queen make a Lease for years, and the Termor makes a Feoffment in Fee, the Term by this is extint, as was agreed upon an Evidence in the Exchequer, 28 Eliz. in the Case of Drayton Basset, and before that, in the same Case in the King's Bench, and yet no Reversion is drawn thereby out of the Queen. Suppose then that the Queen before any Office found thereof, grant the Land over in Fee, shall not the Patentee take advantage thereof by extinguishing the Term? It is clear that he shall, and albeit a Termor holdeth over his Term, yet the Patentee of the Queen, and also the Bargainee of a common Person after the Enrolment of the Bargain shall take advantage of this determination of the Term.

And for the not reciting of Throgmorton's Lease in the Letters Patents made to Finch and Audeley, it is to no purpose to speak to it, because the Estate was finished before the Grant; And further, because there was a Non obstante in the Patent, that it shall be effectual, notwithstanding any non recital of any Lease being of Record, or not being of Record, Mis-recital, &c. which was by all at the Bench admitted to be good, and not contradicted by any.

And for the Office found after the Grant made, I did not speak to it, because it is of no purpose to help the Patentee, but yet shall serve the Queen for the mean Profits, as hath been said: See more of this Case, Trin. 36 Eliz. pl. 2.

Trinity Term, 35 Eliz.

Hughes *versus* Robotham.

Meredith Hughes brought an Action upon the Case against William Robotham Executor to James Robotham, for that the Plaintiff in the life time of the said Testator, to wit, the 12th of April, 28 Eliz. at London, in such a Parish and Ward, was possessed of a Messuage, with the Appurtenances, in the same Parish and Ward, for divers years then to come; And whereas also the said Testator was then possessed of the Reversion thereof after divers years then also to come, and so possessed, the said Testator the said 12th day of April, at London, in the Parish and Ward aforesaid, in consideration that the Plaintiff at the instance and request of the Testator in his life time would surrender all his Estate and Term of years which he then had to come in the said Messuage, with the Appurtenances, and procure one Thomas Thornell to give to the said Testator an hundred Parks for a Lease thereof to be made by the said Testator to the said Thornell, he assumed and promised to pay to the Plaintiff 30 l. of the said 100 Parks, when he shold be thereunto required by the Plaintiff.

And the Plaintiff alledged in facto, that he at the instance and request of the said Testator in his life time afterwards, to wit, the 20th day of April, 28 Eliz. at London, in the Parish and Ward aforesaid, surrendered to the said Testator all the Estate and term of years which he then had to come in the said Messuage, &c. and that he, the same 20th day of April, in the same Parish and Ward, procured the said Thornell to give to the said Testator an hundred Parks for a Lease of the said Messuage, &c. by the said Testator to the said Thornell, then and there made for 19 years, from the Feast of the Annunciation of our Lady then last past, and that yet the said Testator in his life time, nor the said Defendant after his death, have not paid to him the said 30 l. albeit the said Testator in his life time, to wit, the 24th day of April aforesaid, at London, in the Parish and Ward aforesaid, as thereunto required by the said Plaintiff, and albeit the Defendant after the death of the said Testator, to wit, the 10th day of April, 32 Eliz. in the Parish and Ward aforesaid, was also

also thereunto required by the said Plaintiff : And albeit there were sufficient Goods and Chattels of the said Testator at the time of his death, to pay as well the said 30 l. as all other Debts of the said Testator, and also to discharge the Funerals of the said Testator, which Goods and Chattels came to the said hand of the said Defendant, &c.

And after Non assumpcioe pleaded, and a Verdict so; the Plaintiff, exception was taken in Arrest of Judgment, that the Declaration was not good.

1. Because it is, that the Plaintiff the 20th day of April, 28 Eliz. surrendered all the Estate and Term which he had then to come, and this (soz any thing shew) may be another Term than he had the 12th day before, for it is not said, and so being possessed the 20th day he surrendered, but generally as before.

And further the Consideration was, that he ought to surrender all the Term which he had the 12th day of April, which cannot be made the 20th day, for in the mean time, part of the Term is incurred, and therefore the purpose was that the Surrender should have been made immediately as soon as might be, so as by the delay thereof the said Robotham should not lose any part of the Term to come.

And it was further alleged, that a Term for years cannot be surrendered to another Term for years.

Gawdy, The Consideration is, that the Plaintiff at the request of the Testator, in his life time should surrender, so that it is not to be done until he be required by the Testator, and not instantly at his peril without Request precedent; and here it is alleged that the Plaintiff at the request of the said Testator, the 20th day of April surrendered, which is well done, and according to the Agreement, and albeit it had been more formal to have said that the said Plaintiff so being possessed afterwards, to wit, the 20th day of April, surrendered, &c. yet it shall not be intended that he had any other Term than that which he had before, if it be not shewn on the other side in his Part, and especially here, where the Action is not grounded upon the Term, but upon the Assumpcioe, and the Consideration is nothing but an inducement to the Assumption, which is not so formal to be made as if the Action had been grounded upon the Term it self. And therefore in an Action upon the Case upon an Assumpcioe, it sufficeth to say, that whereas the Defendant was indebted to the Plaintiff in divers sums of Money amounting in all to an 100 l. the Defendant assumed to pay him the 100 l. at such a day, without saying, how, or in what manner these Debts accrued, or when, because the Action is not merely founded upon the Debt but upon the Promise, and the Debts are but inducements to it: But if it were to recover the Debts themselves in an Action of Debt, there ought to be made a Certainty thereof, to wit, when, and how it comes.

And further here, in as much as the Assumpcioe is found for the Plaintiff, it shall be implied that the Consideration was duly performed, for without due proof of the Consideration the Plaintiff hath failed of his Assumption, and therefore also it shall be now taken that the Testator hath such a Term of years in Reversion, to which the Term for years in Possession may be surrendered, for he saith, that he who hath ten years in Possession may well surrender to him who hath more years, as twenty in Reversion; for the lesser may surrender to the greater Term. To all which Popham and Fennor agreed: And Popham said further, although it shall be taken most strongly against Hughes, to wit, that Robotham had a lesser Term in the Reversion than Hughes had in the Possession, yet the Surrender shall be good, for in Law it is greater and more beneficial for him to have a lesser Term to be a Term in Possession, than to have it to be in Reversion: And by him, if a Lease for twenty years make a Lease for ten years, then he which makes the Lease for ten years hath a Reversion upon these ten years, so that if Rent be reserved upon it, he may dis-

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strain for it and have Fealty of the Termoz : And if he grant the Reversion over for ten years, with Attainment of the Termoz in Possession, the Grantee hath the Reversion and shall have the Rent for the time, and yet the Remainder for years remains always to the Grantor, and therefore before the Reversion granted over, the Termoz for ten years in Possession might have surrendered to his Lessor, and thereby the said Lessor shall have so many of the said years which were then to come of his former Term of twenty years; And after the Reversion granted, he, which hath the ten years may surrender to the Grantee of ten years in Reversion, and there he shall have so many years in Possession which were to come of his Reversion, Quod nota bene: And if he had had a lesser Term in the Reversion than the Lessor himself had in the Possession, it shall go to the benefit of the first Termoz for twenty years, who was his Grantor, for the Term in Possession is quite gone and drawed in the Reversion to the benefit of those who have the Reversion therupon, having regard to their Estate in the Reversion, and not otherwise; to all which Fennor agreed, whereupon Gawdy gave the Rule that Judgment shall be entered for the Plaintiff: But Popham said, that if the Consideration for the Surrender had not been sufficiently alledged, that the Plaintiff shoulde not be helped by the other Consideration of an hundred Marks given by Thornell, for if such an Assumption as this is be founded upon two more Considerations, and such which by possibility may be performed, then the Party hath failed of his Suit: As if a Man in Consideration of 5 s. paid, and of other 5 s. to be paid at a day to come, assume to do a thing, or to pay Money, if the one 5 s. be not paid, or if it be not averred that the other 5 s. was paid at the day limited for the Payment of it, the Party hath failed in his Assumption in the one Case, and the Declaration is insufficient in the other Case, for he hath made a Departure from his Consideration: But if one of the Considerations be impossible, or against Law, there the other Considerations that are possible, or stand with the Law suffice if they be well alledged. And he said, that the Executor shall be charged with the Contract of the Testator by common course of the Court, which stands upon reason, for if an Action of Debt upon a bare Contract be brought against an Executor, if he do not demur upon it, but plead to the Point, that he owes him nothing, and it is found against him, he shall be thereby charged of the Goods of the Dead; and the cause why he may be helped by demurring upon the Declaration in that case, is, because the Testator might have waged his Law in that Case of Debt, which the Executor could not do of other Contracts, and therefore shall not be charged with it by such an Act, if he will help himself by Demurrer; but in the Assumption of his Testator, he could not have waged his Law: and it is founded upon the death of the Testator, to wit, his Debt, with which the Executor by a mean may be charged as before, and therefore the Assumption in such a Case maintainable against the Executor: But if the Testator upon good Consideration assume to make Assurance of Land, or to do any other such collateral thing which doth not sound in a duty of a thing payable, there the Executor shall never be charged with such an Assumption to render Recompence for it. And to this agreed all the Justices of the Common Bench, and Barons of the Exchequer; And such an Assumption hath not been allowed in the King's Bench but of late time, and that but in one or two Cases. But in the other Case it hath been common and of long time used, and therefore now too late to be drawn in question; and if it should be, it may be maintained with good reason in this Case of a duty of a thing payable, in as much as the Testator cannot wage his Law in the Action, but in the other Case there is no reason nor course of the Court to maintain it: But the Judges in the Exchequer Chamber reverled all these Judgments in both Cases.

2. Nota, that this Term was adjourned to Octob. Trin. and because the Writ was, that Adjournment shall be made in Octob. Trin. of all Causes, until Tres Trinitat. the Adjournment was made in every of the Courts of King's Bench, Common Bench, and the Exchequer, the very first day of Octob. Trin. then it was holden by the Justices, that the Adjournment ought not to have been made until the sitting of the Court the fourth day from Octabis.

And because that the Writs were, that at the said Tres Tr. the Term shall be holden thereafter, as if no Adjournment had been, the Justices held that they ought to sit the first day of the said Tres Trin. and so from thence every day until the end of the Term, and so all Causes, as if no Adjournment had been; and so they did accordingly, saving by Assent some of the Justices did not come thither by reason of their far distance from London, at the end of the Term upon the last Adjournment: But they held, that if it had not been for the especial words in the Writ, which were, that it shall be then holden as if no Adjournment had been, the Cause had been the first day of Tres Trin. and the full Term had not been until the fourth day, which was the last day of the Term, quod nota, and so it was of the Adjournment which happened first at Westminster, and afterwards at Hertford from Michaelmas Term now last past.

Michaelmas Term, 35 and 36 Eliz.

Gravenor *versus* Brook, and others.

1. **I**n an Ejectione summe by Edward Gravenor Plaintiff, against Richard Brook and others Defendants, the Case appeared to be this; Henry Hall was seised in his Demesne as of Fee, according to the custom of the Manor of A. in the County of D. of certain customary Tenements holden of the said Manor called Fairchildes and Preachers, &c. In the third year of H. 8. (before which time the customary Tenements of the said Manor had always been used to be granted by Copy of Court-Roll of the said Manor in Feesimple, or for life or years, but never in Fee-tail but then) the said Henry Hall surrendered his said Copy-hold Land, to the use of Joan his eldest Daughter for her life, the Remainder to John Gravenor the Eldest Son of the said Joan, and to the Heirs of his Body, the Remainder to Henry Gravenor her other Son, and the Heirs of his Body, the Remainder to the right Heirs of the said Henry Hall for ever; whereupon in 3 H. 8. at the Court then there holden, a Grant was made by Copy of Court-Roll accordingly, and Seisin given to the said Joan by the Lord accordingly.

Henry Hall died having Issue the said Joan and one Elizabeth, and at the Court holden within the said Manor, 4 H. 8. the death of the said Henry Hall was presented by the Homage, and that the said Daughters were his Heirs, and that the Surrender made as before was void, because it was not used within the said Manor to make Surrenders of Estates Tail, and thereupon the said Homage made division of the said Land, and limited Fairchildes for the Purparty of the said Joan, and Preachers for the Purparty of the said Elizabeth, and Seisin was granted to them accordingly.

Elizabeth died seised of her said part, after which, 33 H. 8. Margaret her Daughter was found Heir to her, and admitted Tenant to this part; after which Joan died seised of the said Tenements as the Law will.

And after the said Margaret takes to Husband one John Adye, who with his said Wife surrendred his said part to the use of the said John Adye and of his said Wife, and of their Heirs; and afterwards the said Margaret died without Issue, and the said John Adye held the part of the said Wife, and surrendred it to the use of the said Richard Brook, and of one John North, and their Heirs who were admitted accordingly, after which, the said John Gravenor died without Issue, and now the said Henry Gravenor was sole Heir to him, and also to the said Henry Hall who had Issue Edward Gravenor, and died, the said Edward entered into the said Land called Preachers, and did let it to the Plaintiff, upon whom the said Richard Brook and the other Defendants did re-enter and eject him. And all this appeareth upon a special Verdict.

And by Clench and Gawdy, an Estate Tail cannot be of Copy-hold Land, unless it be in case where it hath been used, for the Statute of Donis conditionalibus shall not enure to such customary Lands, but to Lands which are at Common Law, and therefore an Estate Tail cannot be of these customary Lands, but in case where it hath been used time out of mind, and they said, that so it hath been lately taken in the Common Bench; But they said, that the first Remainder limited to the said John Gravenor here upon the death of the said John, was a good Fæ-simple Conditional, which is well warranted by the Custom to demise in Fæ, for that which by Custom may be demised of an Estate in Fæ absolute, may also be demised of a Fæ-simple Conditional, or upon any other Limitation, as if I. S. hath so long Issue of his Body, and the like, but in such a Case no Remainder can be limited over, for one Fæ cannot remain over upon another, and therefore the Remainder to the said Henry was void: But they said, that for all the Life of the said John Gravenor, nothing was in the said Elizabeth which could descend from her to the said Margaret her Daughter, or that might be surrendred by the said Margaret and her Husband, and therefore the said Margaret dying without Issue, in the life time of the said John Gravenor who had the Fæ-simple Conditional, nothing was done which might hinder the said Edward, Son to the said Henry Gravenor of his Entry, and therefore the said Plaintiff ought to have his Judgment to recover, for they took no regard to that which the Homage did, 4 H. 8.

But Fennor and Popham held, that an Estate Tail is wrought out of Copy-hold Land by the Equity of the Statute of Donis conditionalibus, for otherwise it cannot be that there can be any Estate Tail of Copy-hold Land, for by Usage it cannot be maintained, because that no Estate Tail was known in Law before this Statute, but all were Fæ-simple, and after this Statute it cannot be by Usage, because this is within the time of Limitation, after which an Usage cannot make a Prescription, as appeareth 22 & 23 Eliz. in Dyer: And by 8 Eliz. a Custom cannot be made after Westm. 2. And what Estates are of Copy-hold Land, appeareth expressly by Littleton, in his Chapter of Tenant by Copy-hold, &c. And in Brook Title, Tenant by Copy-hold, &c. 15 H. 8. In both which it appeareth that a Plaintiff in Copy-hold Land in the nature of a Formedon in the Descender at Common Law, and this could not be before the Statute of Donis Conditionalibus for such Land, because that before that Statute there was not any Formedon in the Descender at Common Law, and therefore the Statute helps them for their Remedy for intailed Land which is customary by Equity: And if the Action shall be given by Equity for this Land, why shall not the Statute by the same Equity work to make an Estate in Tail also of this nature of the Land? We see no reason to the contrary; and if a Man will well mark the words of the Statute of Westm. 2. cap. 1. he shall well perceive that the Formedon in Descender was not before this Statute, which wills that in a new Case a new Remedy may be given, and thereupon sets the form of a Formedon in Descender: But as to the

the Formedon in the Reverter, it is then said, that it is used enough in Chancery, and by Fitzherbert in his *Natura brevium*: the Formedon in the Descender is founded upon this Statute, and was not at Common Law before; And the reason is, because these Copy-holds are now become by usage to be such Estates that the Law allows them to be good against the Lords themselves, they performing their Customs and Services, and therefore are more commonly guided by the Customs and Rules of the Common Law, and therefore as appeareth in Dyer, Trin. 12 Eliz. *Possessio fratris*, of such an Estate, facit sororem esse heredem. And to say that Estates of Copy-hold Land are not warranted but by Custom, and every Custom lies in Usage; and without Usage a Custom cannot be, is true, but in the Usage of the greater the lesser is always implied: As by Usage, three Lives have been always granted by Copy of Court Roll, but never within memory, two, or one alone, yet the Grant of one or two Lives only is warranted by this Custom, for the use of the greater number warrants the lesser number of Lives, but not *e converso*: And so Fæ-simples upon a Limitation, or Estate in Tail are warranted by the Equity of the Statute, because they are lesser Estates than are warranted by the Custom, and these lesser are implied as before in the greater, and none will doubt but that in this Case the Lord may make a Demise for life, the Remainder over in Fæ, and it is well warranted by the Custom, and therefore it seemeth to them that it is a good Estate Tail to John Gravenor, and a good Remainder over to Henry his Brother, and if so, it follows that the Plaintiff hath a good Title to the Land, and that Judgment ought to be given for him. And for the dying seized of Elizabeth, they did not regard it, for she cannot die seized of it as a Copy-holder, for she had no right to be Copy-holder of it: And by the dying seized of a Copy-holder at Common Law, it shall be no prejudice to him who hath Right, for he may enter: But here in as much as the cometh in by admittance of the Lord at the Court, her Occupation cannot be tortious to him, and therefore no Descent at Common Law by her dying seized, for it was but as an Occupation at Will. But if it shall not be an Estate Tail in John Gravenor, as they conceive strongly it is, yet for the other causes alledged by Gawdy and Clench, Judgment ought to be given for the Plaintiff, and the Remainder which is not good shall not prejudice the Fæ-simple Conditional granted to John, which is no more than if the Surrender had been to the use of John Gravenor and his Heirs, the Remainder over, because that we as Judges see that this cannot be good by Law, and therefore not to be compared to the Case where the Custom warrants but one Life, and the Lord grants two joynly or successively, there both the one and the other is void: And this is true, because the Custom is the cause that it was void, and not the Law, and also it is a larger Estate than the Custom warrants, which is not here, and upon this Judgment was given that the Plaintiff shall recover.

And by Popham, it hath been used, and that upon good Advice in some Passages, to bar such Estates Tail by a common Recovery prosecuted in the Lord's Court, upon a Plaintiff in Nature of a Writ of Entry in the Post.

2. Julius Cæsar Judge of the Admiralty Court, brought an Action upon the Case for a Slander against Philip Curtine a Merchant-stranger, for saying that the said Cæsar had given a corrupt Sentence; and upon Not guilty pleaded, and 200 Marks Damages given, it was alledged in Arrest of Judgment, where it was tryed, by *Nisi prius* at the Guild-hall by a partial Inquest, because that upon the default of Strangers, one being challenged and tryed out a Tales was awarded *De circumstantibus* by the Justice of *Nisi prius*; whereas (as was alledged) a Tales could not have been granted in this case, for the Statute of 36 H. 8. cap. 6. which give the Talesis to be intended but of common Tryals of English, for the Statute speaks at the beginning but of such

Juries, which by Law ought to have 40 s. of Free-hold, and wills that in such Cases the Venire facias ought to have this Clause, Quorum quilibet habeat 40 s. in terris, &c. which cannot be intended of Aliens which cannot have Free-hold: and it goes further that upon default of Jurors, the Justices have Authority at the Prayer of the Plaintiff or Defendant, to command the Sheriff or other Minister to whom it appertaineth to make a Return of such other able Persons of the said County, then present at the same Assises or Nisi prius which shall make a full Jury, &c. which cannot be intended of Aliens, but of Subjects, and therefore shall be of Tryals which are only of English, and not of this Inquest which was part of Aliens.

And further the Tales was awarded only of Aliens, as was alledged on the Defendant's part, but in this point it was a mistake, for the Tales was awarded generally de circumstantibus, which ought always to be of such as the principal Pannel was. But Per Curiam the Exceptions were disallowed, for albeit the Statute is, as hath been said, yet when the Statute comes to this Clause, which gives that a Tales may be granted by the Justices of Nisi prius, and is generally referred to the former part of the Act, for it is added; Furthermore be it enacted that upon every first Writ of Habeas Corpora, or Distringas with a Nisi prius, &c. the Sheriff, &c. shall return upon every Juror 5 s. Issues at the least, &c. which is general of all: And then it goes further, And wills that in every such Writ of Habeas Corpora, or Distringas with a Nisi prius where a full Jury doth not appear before the Justices of Assise, or Nisi prius, that they have power to command the Sheriff, or other Minister to whom it appertains, to nominate such other Persons as before, which is general in all places where a Nisi prius is granted, and therefore this is not excepted neither by the Letter nor Intent of the Law. And where it is laid (such Persons) by it, is to be intended such as the first, which shall be of Aliens as well as English, where the Case requires it, for Expedition was as requisite in Cases for, or against them, as if it were between other Persons. And Aliens may well be of the County or place where the Nisi prius is to be taken, and may be there: for although an Alien cannot purchase Land of an Estate of Free-hold within the Realm, yet he may have an House for Habitation within it, for the time that he is there, albeit he be no Deniser, but be to remain there for Merchandise, or the like: And by Gawdy, where the default was only of Strangers, the Tales might have been awarded only of Aliens, as where a thing is to be tryed by Inquest within two Counties, and those of the one County appear, but not those of the other, the Tales might be of the other County only.

Davies *versus* Gardiner.

Vide this Case 3. A ^{lib. 4. 16. b.} Action upon the Case for Slander was brought by Anne Davies, as reported, *soke* against John Gardiner; That whereas there was a Communication of a Marriage to be had between the Plaintiff and one Anthony Elcock, the Defendant to the intent to hinder the said Marriage, said, and published, that there was a Grocer in London that did get her with Child, and that she had the Child by the said Grocer, whereby she lost her Marriage. To which the Defendant pleaded Not guilty, and was found guilty at the Assises at Aylesbury to the Damages of 200 Marks: and now it was alledged in Arrest of Judgment, that this matter appeareth to be meerly Spiritual, and therefore not determinable at Common Law, but to be prosecuted in the Spiritual Court. But per Curiam the Action lies here, for a Woman not married cannot by Intendement have so great Advancement as by her Marriage, whereby she is sure of Maintenance for her life, or during her Marriage, and Dower and other Benefits which the Temporal Laws give by reason of her Marriage

age, and therefore by this Slander she is greatly prejudiced in that which is to be her Temporal Advancement, for which it is reason to give her Remedy by way of Action at Common Law: As if a Woman keep a Tercualling-house, to which divers of great Credit repair, whereby she hath her Livelihood, and one will say to her Guests, that as they respect their Credits, they take care how they use such an House, for there the Woman is known to be a Bawd, whereby the Guests avoid her House, to the loss of her Husband, shall not she in this case have an Action at Common Law for such a Slander? It is clear that she will. So, if one saith, that a Woman is a common Whore, and that it is a Slander to them to come to her House, whereby she loseth the advantage which she was wont to have by her Guests, she shall have her Action for this at Common Law.

So here upon these collateral Circumstances, whereby it may appear that she hath more prejudice than can be by calling of one Parrot, and the like.

And Judgment was given for the Plaintiff.

Hillary Term, 36 Eliz. in the King's Bench.

In Michaelmas Term, 33 & 34 Eliz. Rot. 18t. William and Joan his Wife, Administratrix of Andrew Stock, brought an Action upon the Case upon an Assumption, made to the Intestate for the payment of 5 l. to William Stock, who imparled until Tuesday next after, Octa. Hillary next, which was the 24th day of January, and then the Defendant demanded Oyer of the Letters of Administration which were entered, in hæc verba.

Whereby it appeareth that the Letters of Administration were committed to the said Joan by Thomas Taylor Bachelor of Law, Commissary to the Bishop of London, &c. whereby the Defendant pleaded, that after the last Continuance, the said Letters Patents of Administration, sealed with the Seal of the Vicar General of the said Bishop, which he useth in this behalf, and brought here into Court, bearing date the 27th day of January, 1591. which was three days after the Continuance, committed the Administration to the said Defendant. And pleaded further the Act of 37 H. 8. which says, that it shall be lawful hereafter for any Person, being a Doctor of the Law, to be Chancellor, Commissary, or to exercise Ecclesiastical Jurisdiction, albeit he were a mere Lay Person, so that such a Person be a Doctor as aforesaid, and avers, that at the time of the committing of the Administration to the said Joan, the said Thomas Taylor was a mere Lay Person, and not Doctor Legis civilis nec minister allocatus, according to the Laws of the Church of England, whereby he had no lawful power to commit the Administration.

Upon which it was demurred generally, and by all the Court the Plaintiff had Judgment to recover; for we are to consider what our Law was in this case before the Statute of 37 H. 8. And albeit a Doctor then affirmed, that the Canon Law was, that there was a mere Nullity in such Administration, so although the Party that did it, not being a Clerk nor Doctor, according to the Statute of 37 H. 8. yet all the Justices agreed, that the Administration so committed will be adjudged in our Law to be of force and effect, being shewn under the Seal of the Officer and committed by him, who is reputed the Officer, who ought to do it, and is invested in the Office until it be avoided by Sentence, and yet such an Avoidance shall not make a Man's Act to be made void, no more than if a mere Layman be presented to a Benefice, albeit this be a mere Nullity in our Law, and void, yet we adjudge the Church full, according to the publick Admission, Constitution and Induction, and not according to the capacity of the Person, which is a thing secret, until such an one be deprived for it by Sentence in the Spiritual Court, and yet the Church shall be in our Law void but from the time of Deposition, of which notice ought to be given to the Patron.

So here, he remains as to our Law an Officer until his Authority be defeated by Sentence of the Spiritual Court, otherwise great mischief will happen; for an infinite number of Administrations may be drawn in question by Averment, that he, who granted them was a mere Lay Person, and so make such Gazboils in the Commonwealth, which is not to be suffered for the inconvenience which will happen by it; and therefore our Law which is founded upon Reason shall judge of it according to the open appearance of the Officer, to wit, that he hath a Grant made to him, and not according to the private capacity of the Person, and this is not altered by the said Statute which is made in Affirmation of it, and makes the Authority of a Doctor of Law absolute, not to be defeated by the Civil or Canon Law, which is not in the other Case: But yet it doth not make this Case of worse condition than it was at Common Law. And by all the pleading of the Administration committed to the Defendant, is not good, because it appeareth by the date of it, that it was made after the day of the last Continuance, and therefore could not have been pleaded until a new Continuance after: And by the Doctor the last Administration does not avoid the first, but in case where there is an especial Revocation of the first: But they did not speak of the doubleness because the Demurrer was general and not special, and also because the other matters were so clear.

Property.

2. **I**n Trespass for carrying away certain Loads of Hay, the Case hapned to be this; The Plaintiff pretending Title to certain Hay which the Defendant had standing in certain Land, to be more sure to have the Action pass for him, took other Hay of his own (to wit, the Plaintiff) and mixed it with the Defendants Hay, after which the Defendant took and carried away both the one and the other that was intermixed, upon which the Action was broughte, and by all the Court clearly the Defendant shall not be guilty for any part of the Hay, for by the Intermixture (which was his own Act) the Defendant shall not be prejudiced as the Case is, in taking the Hay. And now the Plaintiff cannot say which part of the Hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the Property in it with which it is intermixed. As if a Man take my Garment and embroider it with Silk, or Gold, or the like, I may take back my Garment: But if I take the Silk from you, and with this, lace or embroider my Garment, you shall not take my Garment for your Silk which is in it, but are put to the Action for taking of the Silk from you.

So here, if the Plaintiff had taken the Defendants Hay and carried it to his House, or otherwise, and there intermixed it with the Plaintiffs Hay, there the Defendant cannot take back his Hay, but is put to his Action against the Plaintiff for taking his Hay. The difference appeareth, and at the same day at Serjeants Inn in Fleet-street, the difference was agreed by Anderson, Perriam, and other Justices there, and this Case was put by Anderson: If a Gold-smith be melting of Gold in a Pot, and as he is melting it, I will cast Gold of mine into the Pot, which is melted all together with the other Gold, I have no remedy for my Gold, but have lost it.

Bullock *versus* Dibler.

3. **I**n an Ejectione summe between Edward Bullock Plaintiff, and John Dibler Defendant, the Case appeared to be this; A Man was seised of a Copy-hold Tenement, parcel of the Mannor of Stratfield Mortimer, in the County of Berks, in Right of his Wife, in his Demein as of Fee, and surrendered this Copy-hold Tenement by himself without his Wife, to the use of a Stranger in Fee, who was admitted by the Lord accordingly, the Husband dies, the Wife dies,

dies, the Heir of the Wife without any admittance enters upon the Stranger, and makes a Lease for a year to the Plaintiff, upon whom the Defendant in Right of him to whom the Surrender was made, re-enters, and adjudged that the Plaintiff ought to recover; and that the Surrender of the Husband was not as a Discontinuance against the Wife, to put the Heir to his Plaintiff in nature of a Sur cui in vita, for a Discontinuance shall not be by a Deed of Feasement only, but by it with the Livery ensuing, whereby the entire Fee-simple is given, what Estate soever the Feofor had by reason of the Livery, where by Deed of Grant nothing passed but that which the Party might lawfully grant: And here it shall be taken if the Grant had been made by the Husband which passed but his Estate, to wit, that which he might lawfully grant without prejudice to his Wife. But yet there is this diversity between a Surrender of an Estate for Life, and a Surrender of an Estate in Fee to the use of a Stranger, to wit, that by the one the Estate drowned in the Lord by the Surrender, and by the other it is not drowned in the Lord, but is transferred to him to whom it was made, upon which he is admitted to it; otherwise, in the last Case it returns to him who surrendered, and then upon the Admittance he is in the Per by him who surrendered, and not by the Lord, or by the Surrender made by Tenant for Life, he to whose use it is made ought to take it of the Lord, and he is there in by him, and not by him who surrendered.

And this is the common difference betwixt Customary Estates for Lives, and Customary Estates of Inheritance.

And the Plaintiff of Cui in vita is given where Recovery by Default is against the Husband and Wife, and not upon the Surrender of the Husband; for suppose the Husband had surrendered merely to the Lord himself, yet the Wife might have entered after the death of the Husband, because the Surrender goes but to the Estate which the Husband might lawfully part with, and therefore rather to be resembled to a Grant than to a Feasement.

And notwithstanding that he was not admitted, yet he might enter and take the Profits, and make a Lease according to the Custom, or bring an Action of Trespass against him who disturbs him: But if the Lord require his Fine or his Services, and the Heir refuse to do them, this may be a Forfeiture of his Copy-hold; But until lawful Seisin made by the Lord (because it belongeth to him) the Heir may intermeddle with the Possession, albeit he be not admitted by the Lord where it is an Estate of Inheritance by the Custom.

And in this Term also in another Case, in the same Court it was adjudged, that an Infant who surrenders his Copy-hold Land within Age, may enter at his full Age, without being put to any Suit for it.

And the first Case was very well argued by one Brock, a Pung uter Barister of the Inner-Temple, this Term for the Plaintiff. And it was the first Demurrer that he argued in Court.

Forth *versus* Holborough.

4. **H**an Action of Debt upon an Obligation of 200 Pounds brought by Robert Forth Doctor of Law, and Mary his Wife, as Executrix to Doctor Drewry, against Richard Holborough, the Case upon Demurral appeared to be this; to wit, That the said Doctor Drewry was seised in his Demesne as of Fee, of the Scite of the Mannor of Goldingham Hall in the County of Essex, and so seised the last day of November, 27 Eliz. demised it to the said Richard Holborough for 17 years from the said last day of November, whereby the Defendant entered into it the next day, and was thereof possessed accordingly, and so possessed the last day of November, 28 Eliz. entered into an Obligation to the said Doctor Drewry, with condition, that if he, his Heirs, Executors, Administrators

Strators and Assigns, or any of them should well and truly pay or cause to be paid to Dorothy Goldingham Widow, or her Assigns, at the Manoy-house of Goldingham Hall in the County of Essex, for the Term of 17 years, from the Feast of St. Michael the Archangel then last past, or an Annuity or annual Rent of 20 Marks of lawful English Money, at the Feast of the Assumption of our Lady, and St. Michael the Archangel, by equal Portions, if the said Dorothy shal so long live, and the said Richard Holborough, or his Assigns, or any other claiming by, or under the said Richard, or his Assigns, shall or may so long occupy or enjoy the said Scite of the Manoy of Goldingham Hall, that then the Obligation shall be void; after which until the 9th day of May, 29 Eliz. the Defendant enjoyed the said Scite, and paid duly the said Annuity, and then he surrendred his Estate in the said Scite to the said Doctor Drewry, and after this did not pay the Annuity over, and yet continued the Possession of the said Scite.

¶ And by all the Justices the Defendant notwithstanding the Surrender made to the Obligee himself, ought to have continued the Payment of the Annuity to the said Dorothy, for albeit the Term be drowned and merged in the Reversion, and so hath not Continuance as to him in the Reversion, yet as to any thing heretofore done by the Defendant who was the Termor in Judgment of Law, it is to be said to have Continuance: As if he had granted a Rent-charge out of it to have Continuance during the said Term, although he surrendered his Term to him in the Reversion, yet the Charge continues, and as to it, the Reversion shall be said to be in the Termor, and albeit the Obligee himself shall not take advantage of his own, or to have the advantage of the Forfeiture of an Obligation there, where his own Act is the cause of his Breach.

And if it had been, that the said Dorothy during the said Term shall have the use of a Chamber within the Scite, without the interruption of him, or his Assigns, there, if after the Surrender, the said Dorothy Drewry had interrupted him of the use of the said Chamber, the Forfeiture of the Obligation shall not be taken against the Defendant for it.

But here the Condition is of a Collateral thing to be done, to wit, the Payment of the Annuity to a Stranger, with which the Land is not bound, and therefore the Breach comes merely in default of the Obligor, and of the Obligee in no part, to wit, and therefore the Obligation here is forfeited.

And by Popham, the Case here is more clear upon consideration of the words of the Condition, for the words are, I the Defendant shall, or may enjoy, &c. and this word (may enjoy) shall be always intended reasonably, to wit, if it may without any thing to be done by him to the contrary; and here if he had not made the Surrender, he might have enjoyed the Scite until the end of his Term, and therefore because it cometh of his own Act, whereby he, or his Assigns shall not enjoy it for the Term, if it shall be said, that he in the Reversion shall not be said in, by the Termor of which he himself shall not take any advantage, in as much as if this had not been, he might have enjoyed for the whole Term. To which all the other Justices also agreed, and upon this Judgment was given for the Plaintiff.

But if any had defeated the said Term by a lawful Entry, By a Title Paramount, the Obligation had not been forfeited for any Default of Payment, after this Entry, but if Rent had been reserved upon the Lease, and for Default of Payment a Re-entry had been made, yet by Popham the Payment ought to be continued upon the peril of the Forfeiture of the Obligation, for the words (may enjoy) in as much as there it is the mere default of the Defendant himself, there the Lease does not continue, of which he shall not take advantage to save his Obligation. But note the form of the Demurrer, and that it might have been better joyned, which is to be seen in the Record where it is entered.

Easter Term, 36 Eliz.

Geilles *versus* Rigeway.

In Debt for 306 l. 6s. 8 d. by William Geillies, against Thomas Rigeway Esquire late Sheriff of Devon; For that whereas John Chaundeler alias Chaundeler, was in Execution with the said Sheriff for the said sum, the said Sheriff afterwards, to wit, the 10th day of December, 34 Eliz. at London, in such a Parish and Ward suffered him to escape, the said Rigeway then being Sheriff of Devon, and having him then in Execution, &c. To which the Defendant pleaded, how that he took him in Execution by the Proces at Stockram in the County of Devon, as the Plaintiff hath alledged, and there detained him in safe Custody until the 8th day of December, 34 Eliz. at which day the said Chaundeler broke the Prison, and escaped out of it contrary to the Will of the said Defendant, and that the Defendant did freshly pursue him, and in this fresh Pursuit did re-take him the 11th day of December, then next ensuing at Stockram aforesaid, and detained him in Execution for the said 306 l. 6s. 8 d. during the time of his Office, and delivered him over to the new Sheriff, &c. To which the Plaintiff replied by Protestation, that he did not make fresh Pursuit; And for Plea saith, That after the going away of the said Chaundeler, and before his re-taking by the said Defendant as aforesaid, the said Chaundeler for a whole day and night, to wit, at London, in the Parish and Ward aforesaid, was out of the view of the said Defendant, &c. upon which it was demurred in Law.

And it was moved by Coke Attorney-general, that Judgment ought to be given for the Plaintiff; for, in as much as it was alledged, that he was out of the view of the Sheriff for a day and a night together, there it shall de intenden to be a Default in the Defendant in the making of his Pursuit, and therefore chargeable to the Plaintiff, and yet he agreed, that if the Sheriff had made his Pursuit freshly; although that at the turning of a Lane, end of an House, or the like, the Prisoner had been out of the view of the Sheriff for a small time, as until the Sheriff cometh to this Turning, end of the House, or the like, yet the Sheriff may retake the Prisoner, and he shall be yet said to be in Execution to the Party against his Will, yet when he is for so long a time out of his view, it shall be otherwise, for the Default which the Law presumes to be in him; and therefore in this Case the Action lies. To which it was answered by Popham, Gawdey and Clench, that if he makes fresh Pursuit, so that it doth not appear fully that there was a Default in the Sheriff in his Pursuit, although he were so long out of his view, yet he shall be said to be in Execution for the Party against his Will upon the re-taking of him: As if he be pursued to an House where he is kept for a long time, and the Sheriff set a Guard upon the House, and after this re-take him the next, or any other day without departing from thence, the Sheriff in such a Case may re-take him upon his coming out of the House, and he shall be in Execution to the Party against his own Will.

And so in all like Cases; As if he pursues him in the night, so as he cannot see him, and yet by the Tract of the Horsle, or Enquiry he makes diligent Pursuit to re-take him, so that it cannot appear that there was any negligence or default in him in making Pursuit.

And it is not the form of the Pleading to alledge, that he pursued him freshly, and had him always in his view until he re-took him, but only that he pursued him freshly and took him in this fresh Pursuit, without laying anything that he was in his view, and therefore his being out of the view of the Sheriff is not material in the Case, but the fresh pursuit, and the taking of him in this Pursuit.

Then Coke moved, that the Bar was not good, because he doth not shew where he made the Pursuit, so that he might agree to answer that which is alledged by the Plaintiff, to wit, his being at large at London, and therefore the Bar not being good, Judgment shall be given against the Defendant for the Insufficiency of his Bar: for a Repleader shall not be in case of Demurrer, as it hath been adjudged here very lately, and also in the Common Bench.

To which it was answered by the said Justices, That if the Bar be insufficient in matter, so that it may appear by it, that the Plaintiff hath sufficient cause of Action, which in matter is not sufficiently avoided by the Bar, Judgment shall be given for the Plaintiff upon the Bar, if the Replication be sufficient, and no Repleader; but if the Bar be sufficient for the matter and insufficient for the form only, as it is here, there before the Statute of Eliz. for pleading there shall be a Repleader, but now because no Demurrer was upon the Bar, but a Replication made to it, therefore by Popham no advantage shall be taken of the Bar for matter of form, which is admitted by the Party, and no advantage taken thereof according to the Statute.

And they all agreed, that the Sheriff, albeit he did not make fresh Pursuit upon the Escape, may yet take, and re-take the Prisoner who escaped from him out of Execution, for the Prisoner shall not take advantage to avoid the Execution; and therefore in respect of the Plaintiff, who yet may accept the Prisoner to be in Execution, the Sheriff may re-take the Prisoner. But if the Plaintiff had recovered against the Sheriff before for the Escape, then the Sheriff for his Indemnity cannot retake him, but is put to his Action upon the Case against the Prisoner, for the Sheriff hath no colour in such a Case of Escape to retake him, but in respect, and for the advantage of the Plaintiff, who had Judgment against the Prisoner, and not in respect of the private wrong done to himself, of which he hath no Judgment, and as it is now, the Replication not being good (by Popham) Judgment ought to be given against the Plaintiff. But by Assent it was ordered that the Defendant shall put in new Bail, and that upon it, he shall plead anew. But how shall it be if the Sheriff do not make fresh Suit and re-take him? And afterwards he, at whose Suit he was in Execution recovered against the Sheriff; may the Prisoner have an Audita querela upon the matter?

Upon an Assembly of all the Justices at Serjeants-Inn in Fleet-Street, with the Barons of the Exchequer, it was clearly agreed by them all (but two, who at the beginning made some doubt of it, but at the end assented also.)

If in the night, the House of any be broken, with an intent to steal any thing being in the House, although no Person be in the House at this time, yet this is Burglary, for the Law is, that every one shall be in security in the night, as well for their Goods as their Persons which be in the House.

And if a Church be broken in the night for the stealing of any thing in it, this is Burglary, though no Person be in it at this time. And so hath the Law always been put in Execution, and in all the Books which speak of Burglary, it is not mentioned that any Person ought to be in the House, but that it is Burglary, the Mischief being broken in the night, to the intent to kill any Person there, or to the intent to steal any thing out of it.

And the Cause that of late time it hath been put in the Indictments of Burglary, that some Person was then there, &c. hath been, because that in such Cases of Burglary, Clergy was taken away, but now by the Statute of 18 Eliz. Clergy is taken away in every Case of Burglary.

And the ancient Presidents are, Quod dominum of such an one Noctanter Felonice & Burglariter fregit, without making mention that any Person was then in it, or making mention that it was Domus mansionalis of any: And it may be a Mansion House, albeit no Person then inhabit in it. And agreed that

that hereafter it shall be so put in Execution by all the Justices. See this more fully hereafter, Trin. 36 Eliz. Pl. 1. in this Book.

AT Tres Pasche this Term there were made for Serjeants at Law; viz. Lewkenor, Savage and Williams of the Middle-Temple, Heale only of the Inner-Temple, Kirgsmill, Warburton, Branchwaite and Flemming of Lincolns-Inn, and Daniel and Spurling of Grayes-Inn.

And all the Justices were assembled in the Middle-Temple-Hall, the Wednesday past Mensem Pasche, being the second day of May, where the two Chief Justices, and Chief Baron sat upon the upper Bench of the same Hall, in their Scarlet Robes with their Collars of S. L. and every one of the other Justices and Barons in their Ancienty, one on the one side, and the other on the other side in their Scarlet Robes also, and then came the new Serjeants in their black Gowns before the Justices there, the two eldest being put in the midst before the Chief Justice of England, and so every one of them, one on the one side, and the other on the other side, according to their Ancienty, and every one of the said Serjeants having one of his Servants behind him at his back, with his Master's Scarlet Hood and Coif upon his Arms: And therupon the said Chief Justice made his Speech in this manner.

IF Men will enter into a due consideration upon what grounds the Laws of this Realm have their Original Foundation, and what good effects are wrought through the due Execution of the same, they might say, and that justly, that the Profession thereof is both an honest, and an honourable Profession.

The Laws are derived partly from the Law of God and partly from the Law of Nature. From the Law of God, in that it ordaineth means how the People may be truly instructed in the Knowledge and Fear of God: How they should demean themselves towards their Sovereign and Prince: How they ought to live one with the other, and how to be defended from Oppressions and Injuries. From the Law of Nature, in that it sheweth how each Man may defend himself; that he may live by his own Labours, or otherwise according to his Profession or Calling; That he may secure his Posterity of that which he hath gathered together by his Industry; and that Man with Man may live together in such secure and comfortable Society as appertaineth. And what be the effects which grow by the due Execution of the Laws? They are these.

By it God is known, the Sovereign Prince obeyed, the People are kept to live in Peace, and that is yielded to each which is his due: And can there be any better things than these upon the face of the Earth? No, there cannot. The Law therefore being taken from so good a Ground, and working such notable and honourable Effects, who can justly say otherwise, but that the Profession of such a Law is an honourable Profession? Are not the Judges of the Law Professors of the Law? See then what God himself in his word hath said of Judges in Psal. 82. speaking of Judgment and Justices he saith thus; *I have said ye are Gods*, and can there be any higher name than this in Heaven or Earth? And why are they so learned? but for that, they in their Offices do resemble that which is the Office of God, as to discern so far forth as Man's Capacity can reach unto between Right and Wrong, Truth and Falshood, the Just and the Unjust, which is a most high, weighty and honourable Charge, and therefore, 2 Chron. 19. 6. cha. Jeboſophat said to the Judges, *Take heed what ye do, for you do not execute the judgments of Men, but of the Lord, and He will be with you in Judgment.* By which it is evident, that they are either grossly ignorant, or otherwise very malignant and contemptuous Persons that may not be induced to be reformed, that do in any wise hold the Profession to be either base or contemptible.

And this I may truly say to the Encouragement and Comfort of such as being honest do profess the Law; That in the most parts of England there are more Gentlemen's Houses, and those of Continuance raised and advanced by that

Profession alone, than by all other the Professions that can be spoken of, and approved.

Let any Man of Experience in the State, of the general part of the Realm enter into a due Consideration of it, and I am well assured he shall find it so; whereby it may plainly appear, that God's Blessings for Worldly Benefits have greatly abounded towards such as have walked evenly and justly in that Calling: yet happily there may be soine (I mean such as slip in by extraordinary means) that sometimes do give Scandal to the Profession; as where such are called to the Degrees of Learning, as are either ignorant, or infamous Persons, whereby they either cannot advise as they should, or by giving themselves over to Slights and to Shifts, they do not advise as they ought.

A matter abhorred of all good and honest Men: But the same being duly weighed, tendeth to the Touch of the Person, and not of the Profession. Nevertheless to avoid this Scandal, I would advise

Such as have Government in these Houses of Court, should be very careful and respective in their Calls, not only to the Bench as Readers, but of those also whom they call to the Bar, that they may be such as may appear to be both learned, and honest, and such as may not justly be impeached of Ignorance, or Ignorancy; for such are not only to advise between Parties, but many of them are drawn to Credit and Government also in their Countries, and therefore behoofful to be free from such Imputations.

And sithence without the Knowledge of the Law in some measure, such as govern in their Countries, may often fall to commit such Errors as were to be wished might be otherwise.

It were convenient that Gentlemen, yea, those of best Worth would bring up their very Heirs in the Knowledge of the Laws, as that they might in after Ages, when as they shall be called to Government, be so able to govern under Her Majesty as might best stand with their Reputations, and the good of their Countries.

And now your selves that are here present, and have been called to this State and Degree of Serjeants at Law (a State and Degree I may well call it, for that Her Majesty doth so term it) since your Gravities and your good Conversations in your Callings hitherto, and the good Opinions conceived of your Learnings, Experiences, and Discretions hath moved Her Majesty to call you to this Dignity.

I am now to advise you so to demean and govern your selves in your Profession as those good things thus conceived of you may not henceforth any ways be blemished, but rather increase, to your further Reputations and Credits. In which you are to have a special regard that you be thankful, first, to God, who hath so guided the Course of your Lives hitherto, as it hath made you to have been thought to have merited this Advancement. Then to Her Majesty, who upon good Report made, hath conceived so well of you as to call you to this Degree, wherein it behoveth you so to demean your selves, as in all Her Highness Service, both in your Countries and otherwise, as you shall be called thereunto, as you may be found to deal therein effectually, diligently and justly.

And Lastly, To the Country and Common-wealth who hath carried so good a Report of you, as thereby you have been rather brought to this place: And the most Thankfulness you can shew to your Country, is, to counsel your Clients according to your Skill honestly and truly, whereby they may not be encouraged to spend their Time and their Substance in vain, frivolous and unjust Suits, to be faithful and secret to your Clients, not disclosing their Counsels to their prejudice, that you expedite your Clients Cause so far forth with conveniency, and your Clients safety, that both in your Practice and otherwise, your Speech and Behaviour towards all Men be modest and discreet, yea, such as appertaineth to Men of your Gravities and Callings, that without respect of Persons, ye be bold to maintain your Clients honest Cause, so far forth as may stand with Knowledge and Discretion: And that in all things you respect more your Honesties, than your Profits.

And

And touching these Points, you have a continual Memory, and that always about you, in your very Garments: And therefore by the Coif, in respect it is white, many things are signified, as Gravity, Wisdom and Experience, for that these Virtues are proper to the gray Hairs, and white headed Men.

There is also signified thereby, that you should be both honest and of an unspotted life: And in that it is fashioned like an Helmet. It signifieth, that you should be both bold to inter your Knowledge in the Law, in the honest and just Cause of your Client, without respect of Persons whomsoever it concerneth. And by the party-colour'd Garments, being both of deep Colours, and such as the Judges themselves in ancient time used (for so we receive it by Tradition) is signified soundness and depth of Judgment and Ability to discern of Causes, what Colour soever be cast over it, and under, or with what Vail or Shadow soever it be disguised: For the wholeness and closeness of your Garments, they do signifie Integrity to be used in your Advices, and Secrecy in your Counsels. And lastly that the Garments being single and unlined, it betokeneth that you should be sincere and plain in your Advices, and not double, carrying your Opinion to your self one way, and you advise it your Client clean another way.

The two Tongues do signifie, that as you should have one Tongue for the Rich for your Fee, as a Reward for your long Studies and Labours, so should you also have another Tongue as ready without Reward to defend the Poor and Oppressed: And thereto to shew your selves thankful to God for all that which he hath bestowed upon you.

And for the Rings you give, as Gold is amongst all Metals the purest, so should you be of all others of your Profession the perfectest both in Knowledge and in the other Virtues before remembred: And in that it is a Ring, and round without end, it betokeneth that you have made a perpetual Vow to this your Profession and Calling, and are as it were wedded unto it: And therefore I heartily wish you may always walk therein according as appertaineth to your Calling.

And this done, the ancient Serjeant beginneth to recite his Pleading, and so each after other in order.

And that done, the ancient Serjeant kneeleth down before the Chief Justice of Eng-
land, and so the rest before the Justices and Barons as they are in Ancienty, and had severally by the said Chief Justice their Coifs put upon their Heads, and then their red Hoods upon their Shoulders, and then the Serjeants return to their Chambers, and put on their party-coloured Garments, and so walk on to Westminster the one after the other, as they be in Ancienty, bare-headed, with all their Coifs on, and so are in their turn presented the one after the other, by two of the ancient Serjeants: And after their Pleadings recited, they give their Rings in the Court by some Friends, and so are thereupon set in their place at the Bar according to their Ancienty.

And all this done, they return to their Chambers, and there put on their black Gowns, and red Hoods, and come into the Hall each standing at his Table according to his Ancienty bare-headed, with his Coif on, and after setteth himself upon the Bench, having a whole Mells of Meat, with two Courses of many Dishes served unto him; And in the Afternoon they put on their Purple Gowns, and then go in order to Pauls, where it hath been accustomed that they heard Service, and had a Sermon.

2 Leonar 93

4. **I**n an Action upon the Case by Rice Edwards against Edward Halinder; The Plaintiff declared by his Bill that one Edward Banister was seised in his Demesne as of Fee, of a Melleuge in such a Parish and Ward in London, and being so seised did let to him the Cellar of the same House the 23d day of April, 32 Eliz. for a week, from the same day, and so from week to week, so long as the Parties should please, at such a Rent by the week whereby he was possessed.

And further, that the said Edward Banister being seised of the said House, as is aforesaid, afterwards, to wit, 29 July, in the 32d year aforesaid, gave to the said Defendant Officium, Anglice, the Ware-house of the said Melleuge being right over the said Cellar, for a week from thenceforth, and so from week to week, so long as the Parties should please, paying such a Rent, whereby the Defendant was thereof possessed accordingly: And the Plaintiff being possessed of the said Cellar, and the Defendant of the Ware-house, as aforesaid, and the Plaintiff then having in the said Cellar three Huts of Back to the value of 40 l. &c. The Defendant the 30th day of July in the 32d year aforesaid, put such a quantity of weight and burthen of Merchandize into the said Ware-house, and thereby did so over-burthen the Floor of the said Ware-house, so that by the force and weight of the said burthen, the said Floor the said 30th day of July was broken, and by force therof did fall, and that thereby the Merchandize that were in the said Ware-house did fall out of the said Ware-house into the said Cellar upon the said Vessels of Wine, and by force therof brake the said Vessels of Wine, whereby the said Wine did fly out of the said Vessels, and became of no value, to the Plaintiff's Damage of an hundred Pounds, &c. To which the Defendant saith, That within a small time before the Trespass committed, the Floor of the said Ware-house sustained as great a burthen of Merchandize as this was: And that the Ware-house was demised to him as the Plaintiff hath alledged to lay in 30 Tun weight, whereby he was possessed, and so possessed the said 30th day of July, did put into the said Ware-house but 14 Tun weight of Merchandize; and that the Damages which the Plaintiff had by the breaking of the Floor, was, because the Floor at the time of the laying of the Merchandize upon it, and also before the Lease made to him thereof was so rotten, and a great part of the Wall upon which the said Floor lies, so much decayed, that for default of Reparations and supporting thereof by those to whom the Reparations did belong, before the Lease therof made, it suddenly brake, which matter he is ready to aver. Whereupon the Plaintiff demurred, and Judgment was given for the Plaintiff in the Exchequer, upon which a Writ of Error was brought in the Exchequer Chamber, and the Error assigned was, that the Judgment ought to have been given for the Defendant, because that now it appeareth that there was not any default in the Defendant, for he was not to repair that which was so ruinous at the time of his Lease, and therefore if it did bear so much lawly before, it cannot fall by the Default of the Defendant in the weight put upon it, but by the ruinousness of the thing demised; and yet by the Advice of the Justices the Judgment was this Term affirmed: for the Plaintiff hath alledged expressly that the Floor brake by the weight of the Merchandize put upon it, which ought to be confessed and avoided, or traversed; whereas here he answers but Argumentatively, to wit, that it did bear more before, therefore that he did not break it by this weight, or that it was so ruinous that it brake, Ergo not by the weight: whereas here it is expressly alledged, that it brake by the weight put upon it, and if lesser weight had been put it would not have broken. And he who takes such a ruinous House ought to mind well what weight he put into it at his peril, so that it be not so much that another shall take

take any damage by it : But if it had fallen of it self without any weight put upon it, or that it had fallen by the default only of the Posts in the Cellar which support the Floor, with which the Defendant had nothing to do, there the Defendant shall be excused ; But here it is expressly alledged, that it fell by the weight put upon it, which ought to be answered : As if a Man take an Estate for life, or years in a ruinous House, if he pull it down he shall be charged in Waste, but if it fall of it self, he shall be excused in Waste ; so there is a diversity where default is in the Party, and where not, so here, the Defendant ought to have taken good care, that he did not put upon such a ruinous Floor more than it might well bear, and if it would not bear any thing, he ought not to put any thing into it, to the prejudice of a third Person, and if he does, he shall answer to the Party his Damages.

Collard versus Collard.

5. **I**n an Ejectione summa brought by Constantine Collard against Richard Collard, the Case appeared to be this ; Thomas Collard was seised in his Demesne as of Fee, of Lands in Winkle in the County of Devon, called the Barton of Southcote : And having two Sons, to wit, Eustace the eldest, and Richard (the now Defendant) the youngest, and the eldest being to be married, the said Thomas in consideration of this Marriage, being upon the said Barton, said these words.

Eustace stand forth, I do here, reserving an Estate for my own life and my Wives life, give unto thee and thy Heirs for ever these my Lands, and Barton of Southcote ; after which the said Thomas enfeoffed his youngest Son of Warton, with Warranty from him and his Heirs, the eldest Son enters, and let to the Plaintiff, upon whom the Defendant re-enters, upon which Re-entry the Action was brought, and upon a special Verdict all this matter appeared : But it was found by the Verdict, that the said Thomas Collard the Father was dead, and therefore the Warranty was not any thing in the Case. And it was moved by Heale that the Plaintiff ought to be barred, because it did not pass by way of Estate, in as much as a Man cannot pass a Free-hold of a Land from himself to begin at a time to come, and by it to create a particular Estate to himself, and in Use it cannot pass, because that by a bare Parol an Use cannot be raised, and by giving my Land to my Son, Cousin, and the like, nothing will pass without Livery, for there is not Consideration to raise an Use.

Fennor. The words shall be taken, as if he had said (here I give you this Warton reserving an Estate for my life) although the words of Reservation have Priority in their time for the speaking of them, because a Reservation can not be but out of a thing granted, and therefore the Reservation shall be utterly void, or otherwise ought to be taken according to their proper nature, to wit, to be in their Operation subsequent, and so shall not hurt the Grant, and therefore are not to be compared to the Case where a Man grant that after the death of I. S. or after his own death a Stranger shall have his Land, which Popham granted.

And Fennor said further, that these words being spoken upon the Land, as before, amount to a Livery.

Gawdy said, That the words as they are spoken amount to a Livery, if the words are sufficient to pass the Estate, but he conceived that the words are not sufficient to make the Estate to pass to the said Eustace, because his intent appeareth, that Eustace was not to have the Land until after the death of him and his Wife, and therefore of the same effect, as if he had granted the Land to the said Eustace after his death ; and as in Use it cannot pass, because by a bare word an Use cannot be raised, as appeareth in divers Reports.

Mich.

Mich. 12 & 13 Eliz. which is a good Case to this purpose : But to say generally that an Use cannot be raised or charged upon a perfect Contract by words upon good consideration, cannot be Law ; and therefore it is to be considered what the Law was before the Statute of 27 H. 8. And I think that none will deny, but that by Grant of Land for Money, before this Statute an Use was raised out of the same Land, for a Bargain and Sale of Land for Money, and a Grant of Land for Money is all one, and no difference between them : And is not a Grant of Land made in consideration of Marriage of my Son and Daughter, as valuable as a Grant of it for Money ? It is clear that it is, and much more valuable, as my Blood is more valuable to me than my Money ; and therefore it is absurd to say, that the Consideration of Money may raise or change an Use at Common Law, and not such a Consideration of Marriage.

And in such a Case at Common Law there was not any diversity, that the Party who so grant or bargain for the one or the other Considerations was seised of the Land granted, or bargained in Use, or Possession, but that the Use by the Contract was transferred according to the Bargain in both Cases where there is a Consideration : And where though all the Law shall it be seen that if any thing which might pass by Contract, there need any other thing than the words which make the Contract, as Writing or the like testifying it ? And that the Law was so, it appeareth by the Statute of Inrolments of Bargains and Sales of Land made, 27 H. 8. which enacts, that no Freehold, nor Use thereof shall pass by Bargain and Sale only, unless it be by Deed indented and enrolled according to the Statute ; Ergo, if this Statute had not been, it had passed by the Bargain and Sale by bare words ; and in as much as the Statute enacts this in the Case of Bargain and Sale only, the other Cases, as this Case here, are as it was before at Common Law. And by an Exception at the end of the same Statute, London is as it was at Common Law, and therefore now Lands may pass there at this day by Bargain and Sale, by word without deed, for it is out of the Statute : And how can we say, that the Statute of Uses does any thing to alter the Common Law in this point, by any intent of the Makers thereof, whereas at the same Parliament they made an especial Law in the Case of Bargain and Sale of Lands. And at this day, for the Lands in London, notwithstanding the Statute of Uses, the Law hath been put in practice, and always holden as to the Lands there to be good, if sold by bare Parol as it were at Common Law. And I have heard it reported by Manwood late Chief Baron of the Exchequer, that it was in question in the time of King Edw. the 6th, whether the Use of a Freehold of Land will pass upon a Contract by Parol without Deed in Consideration of Marriage ; upon which all the then Justices were assembled upon a Doubt rising in a Case, happening in the Star-chamber, and then resolved by all the Justices (as he said) that it shall pass ; and he said, that himself was of this Opinion also : And to say, that by Grant of Land at Common Law, the Use had been raised out of the Possessions of the Land which the Grantor then had, and by it to pass to the Bargainee, and that it shall not be raised and passed to another by Grant of Land in Consideration of Marriage, which is a more valuable Consideration than Money, is absurd and against all reason.

And for the Solemnity, Uses in such Cases (in respect of Marriage) were the cause that they always were left as they were at Common Law, and not restrained as the Case of Bargain and Sale is, which by common intendment may be made more easily and secretly, than that which is done in Consideration of Marriage, which is always a thing publick and notorious, but it is not reasonable that every slight or accidental Speech shall make an Alteration of any Use : As if a Man ask of any one what he will give or leave to any of his Sons or Daughters for their Advancement in Marriage, or otherwise for their Advancement, this shall be but as a bare Speech or Communication,

cation which shall not alter or change any Use : But where there is upon the Speech a Conclusion of a Marriage between the Friends of the Parties themselves, and that in Consideration thereof they shall have such Lands, and for such an Estate, there the Use shall be raised by it, and shall pass accordingly to the Parties, according to the Conclusion which Fennor granted.

But by Popham, If it may be taken upon the words spoken, that the purpose was to have the Estate pass by way of making of an Estate, as by way of Feoffment, &c. then notwithstanding the Consideration expressed, the Use shall not change, nor no Estate by it but at Will, until the Livery made thereupon : And therefore if a Man make a Deed of Feoffment, with express Consideration of Marriage, although the Deed hath words in it of Dedi & Concessi, with a Letter of Attorney to make Livery thereupon, there until Livery made nothing pass but at Will, because that by the Warrant of Attorney, it appeareth the full intent of the Parties was, that it shall pass by way of Feoffment, and not otherwise, if it be of Land in Possession : And if it be of Land in Lease, not until Attornment of Tenants, which was granted by all the Justices.

But if a Man in Consideration of Money makes a Deed of Gift, Grant, Bargain and Sale of his Lands to another, and his Heirs by Deed indented, with a Letter of Attorney to make Livery, if Livery be thereupon made before Inrolment, there it hath been adjudged to pass by the Livery, and not by the Inrolment.

But by Popham, Where Land is to pass in Possession by Estate executor, two things are requisite : The one, the Grant of the said Land, the other, the Livery to be made thereupon, for by the bare Grant without Livery, it doth not pass as by way of making of an Estate : And this is the cause that such Solemnity hath been used in Liberties, to wit, if it were of a Pessuage, to have the people out of it, and then to give Seisin to the Party by the King of the Dow of the House, and of Land by a Turk, and a Twig, and the like, which may be notorious : Yet I agree it shall be a good Livery to say to the Party, Here is the Land, enter into it, and take it to you and your Heirs forever, or for Life, or in Tail, as the Case is ; And albeit Livery by the View may be made in such manner, yet by the sealing of the Deed of Grant upon the Land, or by Grant of it upon the Land without Livery, nothing passeth but at Will. But if thereupon one Party saith to the other after the Grant, or upon it, Here is the Land, enter upon it, and take it according to the Grant, this is a good Livery : But he ought to say this, or something which amounteth to so much, or otherwise it shall not pass by the bare Grant of the Land, although it be made upon the Land. Clench said, That when Thomas said to Eustace, Stand forth, here I do give to thee and thine Heirs these Lands, this amounteth to a Grant and a Livery also ; and by the words of the Reservation of the Estate to himself, and his Wife for their lives, in this the Law shall make an Use in the said Thomas and his Wife for their lives : so that by such means it shall enure, as if he had reserved the Use thereof to him and his Wife, and so it shall enure to them as it may by the Law according to his intent, without doing prejudice to the Estate passed to the said Eustace : And afterwards, Term Mich. 36 & 37 Eliz. The Case was again disputed amongst the Justices, and then Popham said, That the Case of Bargains and Sales of Land in Cities, as London, &c. as appeareth in Dyer, 6 Eliz. are as they were at Common Law ; To which all the Justices agreed, and therefore shall pass by Bargain by Parol, without Writing. And by Baynton's Case in 6 & 7 Eliz. it is admitted of every Side, that an Use was raised out of a Possession at Common Law by Bargain and Sale by Parol, for otherwise, to what purpose was the Statute of Inrolments, and by the same Case it is also admitted now to pass by Parol upon a full Agreement by words in Consideration of Marriage, or the Continuance of Name, or Blood.

For it is agreed there, that the Consideration of Nature is the most forceable Consideration which can be, and agreed also that a bare Covenant by Writing without Consideration, will not change an Use, therefore the force thereof is in the Consideration, of which the Law hath great respect: And therefore the Son and Heir Apparent ex assensu patris, only may at the Will of the Church endow his Wife of his Father's Land, which he hath in Fee, and this is good by Littleton, although the Son hath nothing in it, whereby an Estate palls to the Wife, which is more than an Use. Nature is of so strong consideration in the Law; And thereupon after Advice, Judgment was given for the Plaintiff: the Roll of this appeareth in Banco Regis, 1 Hil. 35 Eliz. Rot. 355. And upon this Judgment a Writ of Error was brought, and the Judgment aforesaid reversed in the point of Judgment in the Exchequer, by the Statute of 27 Eliz.

Kettle *versus* Mason and Esterby.

*Vide this Case
Coke, lib. 1.
146, &c.*

6. **I**n a second Deliverance between John Kettle Plaintiff, and George Mason and Francis Esterby, Defendants, the Case appeared to be this: Thomas May was seised of the Mannor of Sawters and Hawlin, in the County of Kent, in his Demesne as of Fee, and being so thereof seised, enfeoffed Thomas Scot and John Fremling and their Heirs, to the use of Dennis May his Son and Heir Apparent and his Heirs, upon condition, that the said Dennis and his Heirs should pay to one Petronell Martin for his life, an Annual Rent of 10 l. which the said Thomas had before granted to the said Petronel, to begin upon the death of the said Thomas; And upon condition also, that the said Thomas upon the Payment of 10 s. by him to the said Feoffees, or any of them, &c. might re-enter: After which the said Thomas May and Dennis by their Deed dated 30 May, 19 Eliz. granted a Rent-charge out of the said Mannor of 20 l. a year to one Anne May for her life, after which the said Thomas May paid the said 10 s. to the said Feoffees in performance of the Condition aforesaid, and thereupon re-entered into the Land and enfeoffed a Stranger: And whether by this the Rent were defeated, was the Question: And it was moved by Coke Attorney-general that it was not, but that in respect that he joyned in the part, it shall ensue against the said Thomas by way of Confirmation, which shall bind him as well against this matter of Condition, as it shall do against any Right which the said Thomas otherwise had. And therefore by Littleton, If a Diffeisor make a Lease for years, or grant a Rent-charge, and the Diffeisor confirm them, and afterwards re-enters; albeit Littleton there makes a Quare of it, yet Coke said, That the Diffeisor should not avoid the Charge, or Lease which was granted by the whole Court. And by him the Opinion is in P. 11. H. 7. 21. If Tenant in Tail makes a Feoffment to his own use upon Condition, and afterwards is bound in a Statute, upon which Execution is sued, and afterwards he re-enters for the Condition broken, he shall not avoid the Execution, no more the Rent here.

Fennor agreed with Coke, and said further, That in as much as every one who have Title and Interest have joyned in the Grant, it remains perpetually good.

And therefore if a Parson at Common Law had granted a Rent-charge out of his Rectory, being confirmed by the Patron and Ordinary, it shall be good in perpetuity, and yet the Parson alone could not have charged it, and the Patron and Ordinary have no interest to charge it, but in as much as all who have to intermeddle therein are Parties to it, or have given their Assent to it, it sufficeth.

Gawdy was of the same Opinion, and said, That there is no Land but by some means or other it might be charged, and therefore if Tenant for life grant a Rent-

a Rent-charge in Fee, and he in the Reversion confirm the Grant, per Littleton, the Grant is good in Property, so here.

To which Clench also assented, but Popham said, That by the Entry for the Condition, the Charge is defeated: And therefore we are to consider upon the Ground of Littleton in his Chapter of Confirmation, to what effect a Confirmation shall enure, and this is to bind the Right of him who makes the Confirmation, but not to alter the nature of the Estate of him to whom the Confirmation is made; And therefore in the Case of a Grant of a Rent-charge by the Disseisor, which is confirmed by the Demisee: the reason why the Confirmation shall make this good, is, because that as the Disseisor hath Right to defeat the Right and the Estate of the Disseisor by his Regrets, in the same manner hath he Right thereby to avoid a Charge, or a Lease granted by the Disseisor, which Right for the time may be bound by his Confirmation. But when a Man hath an Estate upon Condition, although the Feoffor, or his Heirs confirm this Estate, yet by this the Estate is not altered as to the Condition, but it always remaineth, and therefore Nihil operatur by such a Confirmation to prejudice the Condition. And so there is a great diversity, when he who confirmeth hath Right to the Land, and where but a Condition in the Land. And by him, if a Feoffee upon Condition make a Feoffment over, or a Lease for life or years, every one of these have their Estates subject to the Condition; and therefore by a Confirmation made to them, none can be excluded from the Condition: And the same Reason is in case of a Rent granted by a Feoffor upon Condition, it is also subject to the Condition, and therefore not excluded from it by the Confirmation, as it shall be in case of a Right.

And to prove this Diversity, suppose there be Grand-father, Father and Son, the Father disseise the Grand-father, and makes a Feoffment upon Condition, and dies, after which the Grand-father dies, now the Son confirms the Estate of the Feoffee, by this he hath excluded himself from the Right which descended to him by his Grand-father, but not to the Condition which descended to him from his Father.

And of this Opinion were Anderson and other Justices at Serjeants Inn in Fleet-Street, for the principal Case upon the Case moved there, by Popham this Term: And as the Case is, it would have made a good Question upon the Statute of Fraudulent Conveyances, if the Abowry had been made as by the Grant of Thomas May, in as much as the Estate made to the use of Dennis, was defeasable at the pleasure of the said Thomas, in as much as it was made by the Tenant of the Land, as well as by him who made the Conveyance, which is to be judged fraudulent upon the Statute. But this as the Pleading was, cannot come in question in this Case: and afterwards by the Opinion of other three Judges, Judgment was given that the Grant should bind the said Thomas May, and his Feoffees after him, notwithstanding his Regrets made by the Condition, in as much as the Grant of the said Thomas shall enure to the Grantee by way of Confirmation.

And by Gawdye, If a Feoffee upon Condition make a Feoffment over, and the first Feoffor confirm the Estate of the last Feoffee, he shall hold the Land discharged of the Condition, because his Feoffment was made absolutely without any Condition expressed in his Feoffment.

But Popham denied this, as it appeareth by Littleton Tit. Descents, because he hath his Estate subject to the same Condition, and in the same manner as his Feoffor hath it, into whomsoever Hands it happeneth to come, and therefore the Confirmation shall not discharge the Condition, but is only to bind the Right of him who made it in the Possession of him to whom it is made but not upon Condition.

Morgan's Case.

7. Robert Morgan Esquire, being seised in his Demesn as of Fee, of certain Lands called Wanster Tenements in Socage, having Issue John his eldest Son, Christopher his second Son, and William his youngest Son; by his last Will in writing, demised to the said Christopher and William thus; viz. Joynly and severally for their lives, so that neither of them shall alienate the Lands, and if they do, that they shall remain to his Heirs. Robert the Father dies, and afterwards John his Son and Heir dies without Issue, the Reversion by this descends to the said Christopher, who dies, leaving Issue. And upon this Case made in the Court of Wards, the two Chief Justices Popham and Anderson agreed first, That upon the devise and death of the Father, the said Christopher and William were Joynly-Tenants of the Land, and not Tenants in Common, notwithstanding the word (severally) because it is coupled with the said word (joynly.) But yet they agreed also, that by the Descent from John to Christopher, the Fee-simple was executed in the said Christopher, for the Poyerty in the same Maner, as if he had purchased the Reversion of the whole, or of this Poyerty, and that it is not like to the Case where Land is given to two, and to the Heirs of one of them; in which Case for the benefit of the Survivorship, it is not executed to divide the Joynlyre, because the Estates are made at one and the same together, and therefore not like to the Case where the Inheritance cometh to the particular Estate by several and divided means: And a Decree was made accordingly.

Trin. 36 Eliz. in the King's Bench.

1. It was agreed by all the Justices and Barons of the Exchequer, upon an Assembly made at Serjeants-lun, after search made for the ancient Presidents, and upon good deliberation taken.

If a Man have two Houses, and inhabit sometimes in one, and sometimes in the other, if that House in which he doth not then inhabit be broken in the night, to the intent to steal the Goods then bing in his House, that this is Burglary, although no Person be then in the House, and that now by the new Statute made, such an Offender shall not have his Clergy, for before the Statutes were made, which take away Clergy in case of Burglary, where any person was put in fear, no mention was made in the Indictment of Burglary, that any Person was in the House: But it was general that the House of such an one Noctanter fregit, and such Goods then there Felonice cepit. And the breaking of a Church in the night to steal the Goods, there is Burglary, although no Person be in it, because this is the place to keep the Goods of the Parish. And in the same manner the House of every one is the proper place to preserve his Goods, although no Person be there: And that the Law was always so, it is to be collected by the Course of the Statutes thereof made. For first the Statute of 23 H. 8. doth not take Clergy from any in case of Burglary, unless some of the same Family be in the House, and put in fear. And in 5. Eliz. 6. The Offender shall be ousted of his Clergy, if any of the Family be in the House, be they sleeping or waking. And these Statutes were the cause that it was used of late time, to put in the Indictments of Burglary, that some Person of the Family was then in the House, to put them from their Clergy. But this doth not prove that it shall not be Burglary, but where some Person was in the House, and by 18 Eliz. Clergy is taken away in all cases of Burglary generally, without making mention of any Person

Person

Person to be there, which enforce the Resolution aforesaid, and according to it, they all agreed hereafter to put it in Execution.

Finch *versus* Riseley.

2. **I**n this Term the Case between Finch and Riseley was in question before all the Justices and Barons for this assembled at Serjeants Inn in Fleet-street, where after Arguments heard by the Council of the Parties upon this point only.

If the Queen make a Lease for years, rendring Rent, with a Proviso, that the Rent be not paid at the day limited, that the Lease shall cease without making mention that it was to be paid at the Receipt, whether the Lease shall cease upon the default of Payment, before Office found thereof.

And by Periam and some of the Justices, the Lease shall not cease until an Office be found of the Default, because it is a matter in Fait which determines it, to wit, the Not-payment.

And by Gawdey, it shall be taken as if it had been for the Not-payment, that the Proviso had been that the Lease should be forfeited: In which case it is not determined until Re-entry made for the Forfeiture, which in the Queens Case ought always to be by Office, which countervails the Re-entry of a common Person. As where the Queen makes a Lease rendring Rent, and for default of Payment a Re-entry, albeit the Rent be not paid, yet until Office found thereof the Rent continues.

Popham, Anderson, and the greater part of the Justices and Barons resolved that it was clear in this case, that *Ipsa factio* upon the default of Payment, the Lease was determined, according to the very purport of the Contract, beyond which it cannot have any being, and therefore there needs no Office in the case. But where it is that it shall be forfeited, or that he shall re-enter, there until advantage taken of the Forfeiture in the one case, or until Re-entry made in the other case, the Term always continues by the Contract: And where in the case of a common Person, there is need of a Re-entry to undo the Estate, there in the Case of the King there needs an Office to determine the Estate, for an Office in the King's Case countervails an Entry, for the King in Person cannot make the Entry: And upon this Resolution of the greater part of the Justices in Mich. Term, 31 & 32 Eliz. the same Case was in question in the Office of Pleas in the Exchequer, between the said Moyl Finch Plaintiff, and Thomas Throgmorton, and others, Defendants, and there adjudged by Manwood late Chief Baron, and all the other Barons unanimously after long Argument at the Bar and Bench, that the Lease was void upon default of Payment of the Rent according to the Proviso of the Lease, and this immediately without Office for the Reasons before remembred; upon which Judgment was given, a Writ of Error was brought before the Lord Keeper of the great Seal, and the Lord Treasurer of England, where it long depended, and after many Arguments, the Judgment given in the Exchequer by the Advice of Popham and Anderson was affirmed, and that upon this reason, for the Proviso shall be taken to be a Limitation to determine the Estate, and not a Condition to undo the Estate, which cannot be defeated in case of a Condition, but by Entry in case of a common Person, and but by Office (which countervails an Entry) in the Case of the Queen. And this Judgment was so affirmed in Mich. Term, 36 & 37 Eliz.

Smith's Case.

3. **I**t was found by Diem clausit extremum, after the death of Richard Smith, that in consideration of a Marriage to be had between Margaret Smith, and William Littleton a younger Son to Sir John Littleton Knight, and

and of 1300 Marks paid by the said Sir John to the said Richard, he made Assurance by Fine of his Lands (being 174 l. a year) viz. Of part thereof of the value of 123 l. a year, of which part was holden of the Queen by Knights Service in Capite, to the use of himself for his life, and after his decease to the use of the said William and Margaret, and the Heirs of the Body of the said William, begotten on the Body of the said Margaret, and for default of such Issue, to the use of the right Heirs of the said William. And of the Residue thereof, being also holden in Capite of the Queen, to the use of himself for his life, and after his decease to the use of the first Issue Male of the said Richard, and to the Heirs Males of his Body, and then to other Issues of his Body, and for default of such Issue, to the said William and Margaret, and the Heirs of the Body of the said William, on the Body of the said Margaret, lawfully begotten, and for default of such Issue, to the right Heirs of the said William, with this Proviso, That it shall be lawful for the said Richard to make a Joyniture to his Wife of the Lands limited to his Issue Males, and for making of Leases for 21 years, or three Lives, for any part of the said Land, rendring the ancient Rent, except of certain parcels, and that William died without Issue, and that Gilbert Littleton was his Brother and Heir, and that the said Margaret married the said George Littleton youngest Brother to the said William, which are yet living: And that the said Richard married Dorothy, and made her a Joyniture according to the Proviso: And that the said Richard had Issue John Smith, and died, the said John being his Son and Heir, and within Age.

After which, a Melius inquirendum issued, by which it was found, that the said Margaret was the Daughter of the said Richard, and that the said Land was of the value of 12000 l. at the time of the Assurance: And how much of the Land shall be in ward, and what Land, and what the Melius inquirendum makes in the Case, was the Question put to the two Chief Justices, Popham and Anderson, who agreed that the Queen now shall have the third part, as well of that which was assured to William and Margaret, immediately after the death of the said Richard, as of that which was limited to Dorothy for the life of the said Margaret; for although Money were paid, yet this was not the only Consideration why the Lands were assured, but the Advancement of the Daughter, and now by the surviving of the said Margaret, she shall be said to be in the whole, which was assured to her by her Father, and for her Advancement, and the Land (as it appears) was of greater value than the Money given, and may as well be thought to be given for the Remainder of the Fee. And agreeable to this was the Case of Coffin of Devonshire, about the beginning of the Reign of the now Queen, which was that the said Coffin for Money paid by one Coffin his Cousin (having but Daughters himself) conveyed his Land to the use of himself and his Wife, and to the Heirs Males of his Body, and for default of such Issue, to the use of his said Cousin and his Heirs, for which his said Cousin was to give a certain Sum of Money to the Daughters for their Marriage: Coffin dies, his said Daughters being his Heirs and within Age, and were in Ward to the Queen, the Lands being holden by Knights Service in Capite: And the third part of the Land was taken from the Wife of Coffin for the life of the said Wife, if the Heir continue so long in Ward.

And it was also agreed by them and the Council of the Court, that the Melius inquirendum was well awarded, to certifie that the said Margaret was the Daughter of the said Richard, at which the Court could not otherwise well take Conuincance, for they thought that it was not matter to come in by the Averment of the Attorney-general, as Dyer hath reported it: But now by the Statute, it ought to be found by Inquisition, and being a thing which stands with the former Inquisition, it ought to be supplied by the Melius inquirendum: for the same Statute which gives the Wardship in case where

Land

Land is conveyed for the advancement of the Wife, or Infants, or for the satisfaction of Debts and Legacies of the Party by the implication of the same Statute, this may be found by Inquisition; and if it be omitted in the Inquisition, it ought to be found by a Melius inquirendum, but not to come in by a bare Surmise. And therefore if in the Inquisition it be found, that the Ancestor had conveyed his Land by the Melius inquirendum, it may be found that it was for the Payment of his Debts or Legacies, or that the Party to whom, or to whose use it was made, was the Son, or Wife of the Party that made it, and that by the very purport of the Statute, 32 & 34 H. 8. as by Fitzherbert, if it be surmised, that the Land is of greater value then it is found, a Melius inquirendum shall issue, and so shall it be if it be found that one is Heir of the part of the Mother, but they know not who is Heir of the part of the Father; so if it be not found what Estate the Tenant had, or of whom the Land was holden: so upon Surmise made, that he is seised of some other Estate, or that he held it by other Services, by Fitzherbert a Melius inquirendum shall Issue, and upon this Order given, it was decreed accordingly this Term.

Morgan *versus* Tedcastle.

4. **I**n the same Term upon matter of Arbitrement between Morgan and Tedcastle, touching certain Lands at Welburn, in the County of Lincoln, put to Popham, Walmley and Ewens Baron of the Exchequer: Whereas Morgan had granted to Tedcastle an 100 Acres of Land in such a Field, and so in such a Field, and 20 Acres of Meadow in such a Meadow in Welburn and Hanstead, in which the Acres are known by Estimation or Limits, there he shall take the Acres as they are known in the same places, be they more or less than the Statute, for they pass as they are there known, and not according to the Measure by the Statute, But if I have a great Close, containing twenty Acres of Land by Estimation, which is not 18, and I grant 10 Acres of the same Close to another, there he shall have them, according to the Measure by the Statute, because the Acres of such a Close are not known by Parcels, or by Parts and Bounds, and so it differeth from the first Case: And upon the Case then put to Anderson, Brian and Fennor, they were of the same Opinion: Quod Nota.

Humble *versus* Oliver.

5. **I**n Debt by Richard Humble against William Oliver, for a Rent reserved upon a Lease for years, the Case was this; Thomas Plain was seised in his Demesne as of Fe., of a Messuage in S. and so seised, did let it to the Defendant for divers years yet to come, rendering Rent payable at four usual Feasts of the year, the Lesses thered accordingly, after which the said Plain by Bargain and Sale entailed, conveyed the Reversion thereof to the said Humble and his Heirs, and before the Feast of the Annunciation of our Lady, 35 Eliz. to wit, the 1st day of February, in the same year the said Oliver assigned over his whole Term to one Southcote, who before the same Feast entered accordingly, and for the Rent due at the Feast of the Annunciation of our Lady, the Plaintiff thought this Action: And it was agreed by the whole Court that the Action would not lie against him; for although Plain (if he had not aliened the Reversion over) might have had this Action against the said Oliver, notwithstanding that he had assigned over his Term before, for the pivity of Contract which was between them, in as much as they were Parties to it of either part; yet the Grant of the Reversion shall not

not have advantage of the privity, he being a mere Stranger to the Contract, and now was but privy in Law by the Bargain, and therefore now he hath no Remedy but against him who had the Estate at the time when the Rent hapned to be due: and this is Southmead, and not Oliver. The Roll of this Case is in the King's Bench, Hil. 36 Eliz. Rot. 420.

Mich. 36 & 37 Eliz., In the King's Bench.

Button *versus* Wrightman.

1. *I*s an Ejectione firmæ, between John Button Plaintiff, and Etheldreda Wrightman Widow, and other Defendants; for an House and certain Lands in Harrow. The Case upon a special Verdict was this; The Dean and Chapter of Chriſt's-Church in Oxford were incorporated by King H. 8. by his Letters Patents, dated 4 Novemb. 38 H. 8. by the name of the Dean and Chapter of the Cathedral Church of Christ, &c. Oxford, of the Foundation of King Henry the 8th. and so to be called for ever; after which the said Dean and Chapter was feised in their Demesne as of Exchequer, of the said House and Land, and so being feised by the name of the Dean and Chapter Ecclesie Cathedralis Christi in Accademia Oxon. ex fundatione Reg. H. 8. enfeoffed Edward, late Lord North thereof, by their Dad, bearing date the 21st day of April, 1 E. 6. who afterwards died, and the now Lord North entred, and did let it to the Plaintiff, who was oulted by the Defendant, claiming the said House by a Lease made by the said Dean and Chapter in the time of Queen Elizabeth, for divers years yet to come, and whether his Entry were lawfull, or not, was the question, and all depends upon the mis-naming of the Corporation: But it was found that the City of Oxford, and the University of Oxford were all one, and that the Town of Oxford was made a City by the Charter of King H. 8.

And by Fennor, the Feoffment made to Edward Lord North, for the mis-naming of the Corporation, was void, for he said, that Accademia & villa de Oxford, are divers in name, and divers in nature, for the University is to the Scholars and learned Men there, and the Town for the Inhabitants, and the name of a place is a principal thing in a Corporation, which in a new Corporation ought to be precise, according to the very Letter of the Charter thereof: And therefore in the Case of Chester it was agreed, that Cestria being omitted, the Charter for the Dean and Chapter there had been void.

But by Popham, Gawdrey and Clench, this is not such a mis-naming as to the place whch shall make the Feoffment void: For suppose it had been Decanus & Capitalis Ecclesie Cathedralis Christi in Civitate Oxon. it had been good, for Oxon & Civitas Oxon. are one and the same. So it is if an Hospital to be erected by the name of the Hospital of S. Johns in S. Clements: and they make a Grant by the name of the Hospital of S. Johns in the Parish of S. Clements, it is good, for it appeareth to be the same: And here if a Man will say, that it shall go to the University of Oxford, this every one conceiveth to be the Town of Oxford, and so of Cambridge, and therefore in 8 H. 6. it was agreed to be a good Addition for the place, in an Action Personal, against such an one Chancellor of the University of Oxford, and so it is against J. Beator, of the Parish Church of Dale, without any other Additio[n] for the place, yet the Statute is, that it ought to be named of what Town, Hamlet, or place the Party is. And by Popham, the place in a Corporation may well be resembled to the Sur-name of a Man, and as a Grant made by any Persons Christian name, as John, Thomas, &c. is not good, so in a Corporation it is not good to say, Dean and Chapter, Mayor and Commonalty, and the like, without

without saying, of what place : And anciently Men took most commonly their Surnames from their places of Habitation, especially Men of Estate, and Artizans often took their Names from their Arts, but yet the Law is not so precise in the Case of Surnames, and therefore a Grant made by, or to John, Son and Heir of I. C. or Filio juniori I S. is good : But for the Christian Name, this always ought to be perfect.

So in the Case of a Corporation, it sufficeth to have a sufficient demonstration of the place where the Corporation is, albeit it be not by the precise words comprised in the Charter : as in naming Accademia Oxon. pro Villa Ox. and it is common, of which I have seen divers Charters, where a Town was incorporated by the name of Mayor, and Commonalty of such a Town, as Bristol, Exeter, and others, which afterwards have been made Cities, and yet Charters made to them, and Grants made by them, by the name of Mayor and Commonalty of the City is good, but more precision is used in the Body of the name of a Corporation before the place to which they are annexed, and yet in them, that which is but an Ornament to the Name comprehended in the Charter, shall not hurt the Grant, as of Chapter of S. George of Windsor, if it be of S. George the Martyr, and the like, the Grant by such a name is good, because the Martyr is but an addition of Ornament to the name comprised in the Charter, and it is no other but the same in re vera. So here, if it had been Domini nostri Jesu Christi, because it is the same, and is but an Ornament to the word Christi comprised in the Charter, and so shoud it be also if it had been Christi filii Dei Salvatoris nostri, because it is but a true addition to the same ; whereupon Judgment was given for the Plaintiff, as appears in the King's Bench, Pasch. 35 Eliz. Rot. 258.

And Popham said further in this Case, that to erect an Hospital by the name of an Hospital, in the County of S. or in the Bishoprick of B. and the like, is not good, because he is bound to a place too large, and uncertain : But a College erected in Accademia Cantabrig. or Oxon. is good, and some are so founded because it tends but to a particular place, as a City, Town, &c.

King *versus* Bery and Palmer.

2. **T**han Ejectione firmæ, brought by William King against John Bery and William Palmer Defendants, for two Messuages and certain Lands in Halstead in the County of Leicester, upon a Demise alledged to be made by Dorothy Pool, and Robert Smith, the Case upon a special Verdict was this ; The said Dorothy was Tenant for life of the said Tenants, the Remainder over to the said Robert Smith and his Heirs, and they being so seised made the Lease in the Declaration, upon which the Action was brought. And per curiam, the Lease found by the Verdict doth not warrant the Lease alledged in the Declaration ; for although they joyned in the Demise, yet during the life of the said Dorothy it is her Demise, and not the Demise of the said Robert Smith ; but as his Confirmation for that time ; for he hath nothing to do to meddle with the Land during the life of the said Dorothy, but after the death of the said Dorothy then it shall be said to be the Demise of the said Robert Smith, and not before, because until this time Smith had nothing to do to meddle with the Land. And in a more strong Case, If Tenant for life and he in the Reversion in Fee make a Gift in Tail, for the life of Tenant for life, it shall be said to be his Gift, but after his death it shall be said the Gift of him in the Reversion, and if the Estate Tail had expired during the life of the said Tenant for life, he shall have the Land again in his former Estate, and there shall be no Forfeiture in the Case, because he in the Reversion of the immediate Estate of Inheritance had joyned in it, and therefore hath dispensed with that which otherwise had been a mere Forfeiture of the Estate for life, whereby it was awarded by the Court that the Plaintiff take nothing by his Bill in 33 & 34 Eliz. Rot. And the Judgment is entered, Hill. 34 Eliz. Rot. 72.

3. In this Term I happened to see a Case agreed by the Justices in 3 & 4 Eliz. which was this :

If a Man make a Lease of two Barns, rendering Rent, and for default of Payment, a Re-entry, if the Tenant be at one of the Barns to pay the Rent, and the Lessor at the other end to demand the Rent, and none be there to pay it, that yet the Lessor cannot enter for the Condition broken, because there was no default in the Tenant, he being at one, for it was not possible for him to be at both places together.

And upon this Case now remembred to the Justices, Popham, Walsley, and Fennor said, That perhaps also the Tenant had not Money sufficient to have been ready to have paid it, at either of the said places, but it is sufficient for him to have and provide one Rent, which cannot be at two places together.

And by the Case reported here also ; If Lands and Woods are demised together, the Rent ought to be demanded at the Land, and not the Wood, because the Land is the more worthy thing, and also more open than the Wood : And therefore by the three Justices aforesaid, Rent ought not to be demanded in any private place of Close, as amongst Bushes, in a Pit, or the like, nor in the open and most usual Passage thereto, as at a Stile, Gate, and the like.

4. Upon a Prohibition sued out of the King's Bench, the Case appeared to be this.

The late Lord Rich, Father to the now Lord Rich, devised to his Daughter for her Advancement in Marriage 1500 l. upon condition, that she marry with the Consent of certain Friends ; and deviseth further, that if his Goods and Chattels are not sufficient to pay his Debts and Legacies, that then there shall be 200 l. a year of his Lands sold to supply it, and dies, making the now Lord Rich his Executor, his Goods and Chattels not being sufficient to pay the Debts of the Testator, as was averred, the said Daughter married with an Husband against the Will of those who were put in trust to give their Assents : and the Husband and the Wife sued in the Spiritual Court for the Legacy : and it was surmised that they would not allow the Proofs of the said now Lord Rich, exhibited to prove the Payment of the Debts of his Testator ; and further, that they would charge him for the Sale of the Land ; upon which matter the Prohibition was granted to the Delegates, before whom the matter depended, and now Consultation was prayed in the Case.

Upon which it was affirmed by a Doctor of the Civil Law, that they will allow the Proofs for the Payment of the Debts, according to our Law, and that the Legacy shall not be paid until the Debts are satisfied. But he said, that by the Law, if the Executor do not exhibit his Inventory, but neglect it for a year, or more, that then if any omission or default be in the true value of the Inventory exhibited, that then such an Executor for this default shall pay all the Legacies of his Testator, of what value soever they are, not respecting the Debts, or the value of the Goods or Chattels, how small soever the omission, or default be in the Inventory ; And so he said was the Case of the now Sir Richard S. who did not bring in the Inventory for four years after the death of the Testator, and that in the Inventory exhibited, the Values of every thing were found to be too small, and therefore to be charged by their Law, albeit he hath not Goods and Chattels sufficient of the Testator's. To which it was answered, that this was quite without reason, for by such means every Subject of the Realm may be utterly defeated, if he take upon him the charge of an Executorship : And if this shall be admitted, no man will take upon him the Execution of the Will of any, and by such a means none will have their Wills performed, which shall be too inconvenient

nient. And they said further, that in as much as Debts are to be proved by the Common Law of the Realm, those of the Ecclesiastical Courts ought to admit in the Proof thereof such Proofs as our Law allows, and not according to the preciseness of their Law: And although by their Law such a Condition as before being annexed to a Legacy, is void, because that Marriage ought to be fixt without Coercion, yet where we are to judge upon the Point (as we are here) if the Execution happen to be charged because of the Sale of Land, and for the Money coming thereof, a Prohibition shall be granted to the Ecclesiastical Judge in such a Case, whereby the Court granted a special Consultation in the Case, to wit, that they proceed for the Legacy, provided, that they charge the Executor no further than he hath in Goods and Chattels of the Testator, after his true and due Debts are satisfied: and that in the Case of the Proof of these Debts, they allow such Proofs as by the Law of the Land are holden to be sufficient in such a Case; Quod nota bene, as to the restraining of Ecclesiastical Courts in their Proceedings, to bind any Subject touching his private Temporal Estate, against all reason: And as to it, that they do not intermeddle in any thing belonging to the Common Law of the Realm, as Debts, and the like, against the due Course of the Common Law.

Cawdry *versus* Atton.

5. **I**n Trespass brought by Robert Cawdry Clerk, against George Atton, for breaking his Close at North Luffenham in the County of Rutland, upon Not Guilty, and a special Verdict, the Case appeared to be this, to wit, *Vide this Case Coke, lib. 5. 1. pa.* that the Plaintiff was Rector Ecclesia de North Luffenham aforesaid, of which the place was Parcel, and being so seised, was deprived of his Rectory by the late Bishop of London and his Colleagues, by virtue of the high Commission to them and others directed, because he had pronounced and uttered slanderous and contumelious words against, and in depreciation of the Book of Common Prayer; But the form of the Sentence was, that the said Bishop by and with the Assent and Consent of five others of the said Commissioners his Companions, and namely which deprived him.

And further, it was not found that the Commissioners named were the natural Subjects born of the Queen, as the Statute enacts that they shoulde be: and if the Deparvation be void, then they find the Defendant Guilty, and if it were good, then they find him Not Guilty. And it was moved that the Deparvation was void.

First, Because that whereas the Commission is to them, or any three of them, of which the said Bishop to be one amongst others, it ought to have been the Sentence of them all, according to the Authority given to them, which is equal, and not that it was done by one with Assent of the other. Then because it is not found that the Commissioners are the natural Subjects of the Queen born, as by the words of the Statute they shoulde be.

Another is, because the Punishment which the Statute provides for those of the Ministry which deprave this Book, is to lose the Profits of all their Spiritual Promotions but for a year, and to be imprisoned by the space of six months, and not to be deprived until the second Offence, after that he had been once committed, and therefore to deprive him for the first Offence was wrongful and contrary to the Statute. But by the whole Court for the form of the Deparvation, it is, that which is used in the Ecclesiastical Courts, which always names the chief in Commission that are present at the beginning of the Sentence, and for the other they mention them only as here, but of their Assent and Consent to it, and in such Cases we ought to give Credit to their Form, and therefore it is not to be compared to an Authority given at Common Law by Commission.

And for the matter that is not found, that the Commissioners were the natural Subjects of the Queen born, it is to be intended that they were such, unless the contrary appear: But here at the beginning it is found that the Queen, secundum tenorem & effectum actus predict. had granted her Commission to them in causis Ecclesiasticis, and therefore it appeareth sufficiently that they were such as the Statute wills them to be.

And for Deposition, they all agreed that it was good, being done by the Authority of the Commission, for the Statute is to be understood where they prosecute upon the Statute by way of Indictment, and not to restrain the Ecclesiastical Jurisdiction, being also but in the Affirmative.

And further by the Act and their Commission, they may proceed according to their discretion to punish the Offence proved or confessed before them, and so are the words of their Commission warranted by the Clause of the Act.

And further, the Ecclesiastical Jurisdiction is saved in the Act.

And further, all the Bishops and Papish Priests were deprived by virtue of a Commission warranted by this Clause in the Act: And now lately was it agreed by all the Justices, that a Fine of 200 Marks set upon one for a vicious Liver by the High Commission was warranted by virtue of the Commission and Act: And therefore the Act with the Commission, are to be considered in this Case, whereupon it was agreed that the Plaintiff should take nothing by his Writ: Which you may see, Hill. 33 Eliz. Rot. 315.

Hall versus Peart.

6. **I**n an Ejccione firmæ brought by William Hall Plaintiff, for Land in D. in the County of Somerset, upon a Lease made by William Dodington, against John Peart and other Defendants, upon a special Verdict the Case appeared to be this.

Vide this Case in Coke, lib. 2. 32, 33, by the name of Dodington's Case.

That one John Brown was in Possession of certain Lands in D. aforesaid, which before were parcel of the Possessions of the Hospital or Priory of S. John's in Wells, the Inheritance thereof then being in the late King H. 8. by the Act of Dissolutions: And the King being so seised by his Letters Patents, dated the 26th of March, 30 H. 8. ex gratia speciali, certa scientia & mero motu suo, granted to John Ayleworth and Ralph Duckenfield, omnia illa Hessugia Ter. Tenent. & gardina sua & quacunque tunc in separalibus tenuris diversarum personarum, which he named particularly, amongst which the said John Brown was one in Civitate Wellen. ac in Suburbis ejusdem Civitat. & extra eandem Civitat. within the Jurisdictions and Liberties of the said City, late parcel of the Possessions of the said Hospital, and that the said John Brown had not then any other Lands late parcel of the Possessions of the said Hospital, but this in D. and that this Land was quite out of the said City of Wells, and of the Suburbs thereof, and also out of the Liberties and Jurisdiction of the said City, and yet it was found that it was in the particular and parcel of the value, and valued in it in the Tenure of the said John Brown at 6 s. 8 d. a year, and the Grant was to the said John Ayleworth and Ralph Duckenfield, and to the Heirs of the said John Ayleworth for ever.

And it was moved that the Grant was good to the said Ayleworth and Duckenfield, because of the Statute of Non-recital and Mis-recital, because it appears by the particular, and value that it was intended to be passed: And if this doth not pass, nothing can pass which was in the Tenure of the said Brown, because he had nothing in the places comprised in the Patent.

But it was agreed by all the Court, that it shall not pass by the said Patent in this Case, for the word (illa) is to be restrained by that which follows in the Patent, where it depends upon a Generality, as here, and that it refers but to that in Wells, as the Liberty of that which was parcel of the Possessions

essions of the said Hospital, and in the Tenure of the said John Brown: And if it were not of these Possessions, or not in Wells, &c. or not in the Tenure of the said John Brown, it shall not pass, for the intent of the King in this Case shall not be wrested according to the particular or the value, which are things collateral to the Patent, but according to his intent comprised in, or to be collected by the Patent it self.

And Popham said, that by Grant of omnia, terras Tenementa & Hereditamenta sua in Case of the Queen nothing passes, if it be not restrained to a Certainty, as in such a Town, or late parcel of the Possessions of such an one, or of such an Abby, or the like, in which Cases it passeth, as appeareth by 32 H. 8. in Case of the King: But if it be Omnia, terras & tenementa sua vocat. D. in the Tenure of such an one, and in such a Town, and late parcel of the Possessions of such an one, there albeit the Town or the Tenant of the Land be utterly mistaken, or that it be mistaken of what Possessions it was, it is good, for it sufficeth that the thing be well and fully named, and the other mistakes shall not hurt the Patent.

And the word of Ex certa scientia, &c. will not help the Patent in the principal Case. And the Case of 29 E. 3. is not to be compared to this Case, for it was thus.

The King granted the Advowson of the Priory of Mountague (the Prior being an Alien) to the Earl of Salisbury and his Heirs for ever: And also the keeping and Farm with all the Appurtenances and Profits of the said Priory, which he himself had during the War, with the keeping of certain Cells belonging to the said Priory; the said Earl died, William Earl of Salisbury being his Son and Heir, and within Age: whereupon the King reciting that he had seised the Earl's Lands into his hands after his death, for the Nonage of the Heir, he granted to the said Earl all his Advowsons of all the Churches which were his Fathers, and all the Advowsons of the Churches which belong to the Prior of Mountague, to hold until the full Age of the said Heir, & quas nuper concessit prefat Comiti patri, &c. In which Case, although the King had not granted the Advowsons to the said Earl the Father aforesaid, by the former Patent, because no mention was of the Advowsons thereof, yet they pass by this Patent, notwithstanding that which follows after, to wit, and which he granted to the Father of the Grantee: But there it is by a Sentence distinct, and not fully depending upon the former words, as here, to wit, *Omnis illa Messuagia, &c.* in *Wells*, in the Tenure of the Party, parcel of the Possessions of such an Hospital, or Priory: *Quod nota*, and the difference.

And because the Defendant claimed under the first Patent, and the Plaintiff by the latter Patent, it was agreed, that the Plaintiff should recover: Which you may see in the King's Bench.

Harrey *versus* Farcy.

7. **I**n an Ejectione firmæ brought by Richard Harrey Plaintiff, for the Recovery of certain Tenements in North-Petherton, in the County of Somerset, upon a Lease made by Robert Bret against Humfrey Farcy Defendant, upon Not Guilty, and a special Verdit found, the Case appeared to be this, to wit, That Robert Mallet Esquire was seised of the said Tenements, in his Demesne as of fee, and so seised, demised them to John Clark, and Elianor Middleton, for term of their lives, and of the longer liver of them, after which the said Tenements (amongst others) were assured by Fine to certain Persons and their Heirs, to the use of the said Robert Mallet for term of his life, and after his decease to the use of John Mallet his Son and Heir of his Body; and for default of such Issue, to the use of the right Heirs of the said Robert Mallet.

After

After which the said Robert Mallet (having Issue the said John Mallet, Christian and Elianor Mallet) died, the said John Mallet then being within Age, and upon Office found in the County of Devon, for other Lands holden of the Queen in Capite by Knights Service was for it in Ward to the Queen : Afterwards the said John Mallet died without Issue during his Monage, and the Lands aforesaid thereby descended to his said two Sisters, to whom also descended other Lands in the County of Devon, holden of the Queen in Capite by Knights Service, conveyed also by the same Fine in like manner, as the Lands in North Petherton, the said Christian then being of the Age of twenty two years, and the said Elianor of the Age of fifteen years, upon which the said Christian and Elianor, 12 Novemb. 31 Eliz. tendered their Livery before the Master of the Wards, and before the Livery sued, the said Christian took the said Robert Bret to Husband, and the said Elianor took to Husband one Arthur Ackland ; after which in the Utas of the Purification of our Lady, 32 Eliz. the said Robert Bret and Christian his Wife, levied a Fine of the said Tenements in North Petherton, amongst others to George Bret and John Pecksey, Sur conusance de droit come ceo que ils ont de lour done, by the name of the Hoyer of the Manoy of North Petherton, &c. with Warranty against them and the Heirs of the said Christian against all Men, who tendered it by the same Fine to the said Robert Bret and Christian, and the Heirs Males of their Bodies, the Remainder to the Heirs spales of the Body of the said Christian, the Remainder over to the right Heirs of the said Robert Bret, which Fine was engrossed the same Term of S. Hillary, and the first Proclamation was made the 12th day of February in the same Term ; the second, The first day of June in Easter Term, 32 Eliz. The third, the 8th day of July in Trinity Term next : And the fourth Proclamation was made the 4th day of October in Michaelmas Term next after. And the said Christian died without Issue of her Body. The 9th day of February, 32 Eliz. between the hours of 3 and 7 in the Afternoon of the same day. And the 22d of March, 32 Eliz. the said Robert Bret by his Writing indented, dated the same day and year, for a certain sum of Money to him paid, by the Queen, bargained and sold, gave and granted the said Tenements to the said Queen, her Heirs and Successors for ever, which Deed was acknowledged the 25th day of March, 32 Eliz. and enrolled in the Chancery the 12th day of May, in the same year : And there was a Proviso in the same Deed, that if the said Robert Bret shall pay to the Queen at the Receipt of the Exchequer 5 s. of lawful Money, that then the said Gift, Grant, Bargain and Sale shall be void, and that from thence-forward it shall be lawful for the said Robert Bret and his Heirs to re-enter into the said Tenements, and in the mean time between the Inrolment of this Deed and the said 14th day of October, to wit, the 15th day of September, 32 Eliz. the said Arthur upon the said Tenements in North Petherton, entered and claimed the Reversion thereof in the Right of the said Elianor his Wife, by reason of the death of the said Christian : And that afterwards, to wit, the 30th day of February, 33 Eliz. the said Robert Bret to redeem the said Tenements out of the Queen, paid the said 5 s. at the Receipt of the Exchequer, which Payment is there recorded, and enrolled accordingly ; after which in September, 34 Eliz. the said Arthur and Elianor sued out the special Livery of the said Elianor, out of the hands of the Queen, of all the Lands seised into the hands of the Queen by reason of the Monage of the said John Mallet. And afterwards in the same Month of September, 34 Eliz. the said Arthur and Elianor sued out another special Livery, as Heir to the said Christian, of all the Lands which are in the Queens hands by the death of the said Christian.

And it was further found that the said John Clark and Elianor Middleton died after the 5 s. paid as before, and that the said Robert Bret entered the 8th day of October, 34 Eliz. and then made the Lease to the Plaintiff, upon which

which the Defendant by Commandment of the said Arthur, and with him entered upon the Plaintiff; and the general Question was, whether the Entry of the Defendant were lawful? But no Ouster of the Plaintiff was found.

And by Clench and Fennor, a Fee-simple pals at Common Law by a Fine levied by him in Reversion, or Remainder in Tail, because a Fine is said to be a Feoffment of Record, and by their Entry and Feoffment a Fee-simple pals in such a Case at Common Law.

But by Popham and Gawdy, a Fee-simple doth not pals, nor nothing but that which Tenant in Tail may lawfully grant over, which is for his life, in which he said, that Littleton was plain in all Cases of Grant, although it be by Fine, and a Fee-simple does not pals at Common Law, but where the Fee may be drawn out of him who had the Reversion or Remainder in Fee thereupon, if such a Reversion or Remainder had been in a Stranger, which had not been in this Case, if the Reversion or Remainder had been in a Stranger; and therefore a Discontinuance cannot be of an Intail where the Reversion or Remainder is in the King.

But by them all, however it was at Common Law, it is clear upon the Statute of Fines, that a Fee-simple determinable pals by such a Fine as soon as the Fine is levied, because every Fine by presumption of Law shall be taken to be such whereupon Proclamation was made, until the contrary thereof appeareth to the Court.

And this is the reason why a Quid juris clamat is at this day maintained upon such a Fine, which was not at Common Law before this Statute, or otherwise it will never lye. And so it was holden lately in the Common Bench, in the Case of Justice Wimondham, and yet we may see that the Quid juris clamat ought to be brought before that the Fine be engrossed, whereby it is manifest that now a Fee-simple shall pals by the Fine levied, for the possibility of the Proclamations, to wit, that the Proclamations shall not be made, and to this Fee-simple the Proclamations shall enure to make a Bar to the Estate Tail: But such a Fine by Popham and Gawdy was not any wrong to him who had the Reversion or Remainder in Fee being levied by him who had a mean Reversion or Remainder in Tail, depending upon an Estate for life, or in Tail Precedent.

And it is clear, that the Proclamations do not make the Estate, but enure to the Estate made by the Fine, for if an Estate be granted in Reversion for life, or in Tail by Fine, with Proclamations by such a Tenant in Tail, in Reversion or Remainder, the Proclamations work to this Estate, and no further, for always the Estate pals by the Fine, and the Proclamations make the Bar according to the Estate, which pals by the Fine before.

But by Clench, Gawdy and Fennor, the Fee simple which was in the Queen after the Fine levied as before, was divested by means of this Claim made upon the Possession of the Queen, so that the Proclamations following are of no force to hurt the Estate Tail, for they laid, in divers Cases a Possession may be invested out of the Queen without Office, Petition or Monstrans de droit, as the Case is, where a Man devise that his Land shall be sold, and in the mean time before the Sale, the Possession of the Land cometh to the Queen, and afterwards the Land is sold according to the Will, the Wendee enter, there the Land pals from the Queen thereby, and is divested, and so in many other Cases. And in all Cases where the Queens Estate is determined, the Subject may enter into the Land without Office, or Ouster le main, &c. And they said, if it had been in the Possession of a common Person, that by such a Claim the force of the Fine had been defeated; and this appeareth by the Case between Smith and Stapleton in the Commentaries, where it is holden that where a Fine is levied with Proclamations by Tenant in Tail of an Abbotship, Rent or Liches, by Claim made by the Heir in Tail, before the Proclamations are passed, where the Tenant in Tail is dead, the same

same is defeated, and that the Proclamations passing afterwards, shall not be of force to bar the Intail.

And they said, that the Conveyance thereof to the Queen after the Fine levied, doth not make it to be in worse Case; And admit it will not serve against the Queen, yet the Claim will serve against Bret, when he had entered by the performance of the Condition.

And Clench and Gawdy said, that Bret shall not take advantage of this Conveniency made by himself, of very purpose to bar the Party who had Right, and to put him without Remedy, no more than where the Dilleiloy enfeoff his Father who dies seised, he shall not take advantage of this Descent, or if he who hath cause of Action to recover Lands by Covin, causeth another to enter into the Lands, to the intent to recover against him, and does it accordingly for the Covin, the Recovery shall be avoided, and in the same manner here.

But Popham took a Diversity, where the Possession of the Estate of the Queen is determined, and where not, for where the Estate is determined, there the Subject may enter into the Land without Office, or Ouster le main: But where the Possession continues, there the Party shall not come to it, unless by Petition, Monstrans de droit ex officio, or the like, and therefore he said, that if the Queen had an Estate pur autre vie, or depending upon any other Limitation, if it be determined according to the Limitation, the Party who hath Interest may enter; so in the Case of the Devise put before.

And if a Lease be made for life, the Remainder in Tail, the Reversion in Fee, and he in the Remainder in Tail levy a Fine, Sur conusance de droit come ceo que il ad de son done to a Stranger with Proclamations according to the Statute, and afterwards the Stranger convey the Remainder, to the Queen, her Heirs and Successors, and after the Tenant for life dies, and after he in the Remainder in Tail dies without Issue, now may he in the Remainder in Fee enter, because the Estate of the Queen is determined: But here the Queen hath a Fee-simple in her self but determinable upon the Estate Tail which yet remaineth, which Fee-simple in Reversion cannot be divested out of the Possession of the Queen but by matter of Record, of so high nature as it is in her, to wit, by Petition, Monstrans de droit, or the like: As if a Reversion or Remainder be alienated in Mortmain, the Claim of the Lord sufficeth there to vest the Reversion in the Lord for the Alienation, but if the Reversion or Remainder of which such a Claim was made be conveyed to the King, his Remedy is now by Office, Monstrans de droit, or Petition, for Claim will not now serve him, for this shall be to divest the Possession out of the Queen, which by such means cannot be done no more than where a Reversion or Remainder is granted to the Queen upon Condition, but he ought to have an Office to find the performance of it, if it be to be performed by matter in pais, and without Monstrans de droit, or otherwise it shall not be divested out of the Queen's Possession, yet in the Case of a common Person, a Claim will divest it out of them, but not so of the Queen.

And these Cases Gawdy agreed; but he conceived that in the Case in question, the Claim made determines the Estate of the Queen, which is made by means of the Fine upon the Statute.

And Popham denied the Case put in 7 H. 6. to be Law, as it is put upon the Opinion of Strange there, for it is clear, that the Claim there does not divest any Possession which was in the King by means of the Wardship, and if this be not thereby defeated, the Claim does not help the Dilleiloy against the Descent; and this appeareth fully by Littleton, who saith so of a Claim which avoids a Descent, to wit, that it ought to be such upon which the Dilleiloy may upon every such Claim made have an Action of Trespass or Assize against the Dilleiloy, or him who is in Possession, if he continue his Possession after such Claim made, which cannot be in this Case where the Possession

session is in the King, which cannot be defeated by such a Claim. And in the Lord Dyer where the Foffee, or Mortgagee of Lands holden of the Queen in Capite by Knights Service, died before the day of Redemption, his Heir being within Age, whereby upon Office found, the Queen had the Wardship of the Body and Land of the Heir, after which the Mortgage at the day of Redemption made payment, and of this also an Office was found, yet he could not enter either before or after Office, but upon Monstrans de droit thereupon he had his Outer le main: And the reason why a Claim shall serve in this Case between common Persons, is, because that by such Claim the thing it self is devested out of him who had it before, and thereby actually vested in him who made the Claim: As where a Villain purchase a Reversion by the Claim of the Lord, the Reversion is actually in him, as it is of a Possession by Entry: But where he is put to his Claim to divest any thing out of a common Person, he is put to his Suit to devest it out of the Queen.

And to say, that Bret should not take advantage of this Conveyance made, to make it good by the Fine.

I think the Law to be clear otherwise as to this Point, for the Statute of Fines was made for the security of Purchasers and Possessors of Land, and therefore taken more strongly against them who pretend Right or Title, and for the greatest advantage that may be for the Possessors of Lands, and therefore the Possessor by whatever means he can, may make his Fine to be forcelable. And therefore the Fine upon this Statute differeth much from a Fine at Common Law; for where at Common Law an Infant being a Disseisor was disseised by one who levies a Fine, and the year and the day pass without Claim of the first Disseisor, now was the first Disseisor barred: yet if afterwards the Infant (who was not bound by the Fine) enter, the first Disseisor may enter upon him, because that by this Entry the Fine at Common Law was utterly defeated.

But now by the Statute, such a Fine being levied with Proclamations, the first Disseisor not pursuing according to the Statute, is barred for ever.

And although the Infant enter at full Age, and undoes the Fine as to himself, yet this Fine remains always to bar the first Disseisor, and makes that the Infant hath now Right against all the World, and so now takes advantage thereof: And this is the intent of the Statute for the repose of Controversies and Quicnes, and the Quiet of the People.

And if I procure a Fine to be levied on purpose to bar another of his Action, which he may have against me for the Land, yet I shall take advantage of this Fine, and the other shall have no advantage against me, because of this Coincidence, for if this should be admitted, it will countervail the benefit which is intended to be by means of the Statute of Fines.

And if a Disseisor enfeoff another upon Condition, to the intent that a Fine with Proclamations shall be levied to the Foffee to bar the Disseisor, and after the Disseisor is barred, the Disseisor enter for the Condition, he shall yet take advantage of the Fine against the Disseisor.

And Popham put a Case which was in this Court, 23 Eliz. upon a special Writ which was between Okes Plaintiff, upon the Demise of John late Lord Sturton of Cottington, which was this.

The Lord Sturton was Tenant for life of certain Lands in Ligne in the County of Somerset, the Remainder in Tail to Charles late Lord Sturton, Father to the said John Lord Sturton, and the said Charles Lord Sturton disseised the said Lady Sturton, and levied a Fine of the said Land to Cottington and his Heirs with Proclamations according to the Statute, and warranted it against him, and his Heirs.

And the said Lord Charles died before the Proclamations past, and the Warranty descended upon the said John Lord Sturton, after which, and before the Proclamations past, the said Lady Sturton entered upon the said Cottington, after which the said Lady died, and after her death and all the Proclamations past, the said John Lord Sturton as Heir in Tail entered, and made the Lease to the said Okes, upon whom Cottington the Defendant entered, as under the Right of the said Cottington the Conuke, and I perceiving the Court strongly to incline upon the matter of Warranty, that it shall bar the Entry of the Heir, and make a Discontinuance against him, according to the Inference which is taken by Littleton in his Chapter of Discontinuance, because the truth was, and so acknowledged to the Court (although it were omitted in the Verdit) that the said Charles Lord Sturton was attainted of Felony and Murther, and so the Blood corrupted between the said Charles and John Lord Sturton, whereby in a new Action the Guaranty had not hurt the Title of the said Lord John.

I then moved the Court upon the other Point of the Fine with Proclamations; and the Court also agreed in this Point, if the Warranty had not been, that yet the Fine with Proclamations shall bar the said John Lord Sturton, notwithstanding the Entry made by the Lady Sturton were before the Proclamations past, because that notwithstanding his Regrets made, the Reversion remains in Cottington not defeated by his Regrets, in respect of the Statute which makes that the Fine remains effectual against the Heir in Tail, if nothing be done by him to undo it before the Proclamations past as by Claim, Regrets, and the like; but the Act of a Stranger shall not help him, whereby Judgment being thereupon given against the said Okes, the said John Lord Sturton stood satisfied, and the Cottingtons enjoy the Land to this day; whereas, if this Opinion of the Court had not been on a new Action, the said Sir John might have been relieved against the Warranty.

And Gaudy said: that this was a very good Case for the Point upon the Statute in this Case.

Earl of Shrewsbury *versus* Sir Thomas Stanhop.

Gilbert Earl of Shrewsbury, a-
Gilbert Earl of Shrewsbury brought a Scandalum Magnum against Sir Thomas Stanhop Knight, and it was upon the Statute Tam pro Domina Regina quam pro seipso, &c. For that Communication was had between the said Sir Thomas, and one Francis Fletcher, of divers things touching the said Earl, the said Francis at such a day and place, said to the said Thomas,

My Lord (the said Earl meaning) is a Subject (innuendo) that the said Earl was a Subject of the now Queen) the said Sir Thomas then and there said of the said Earl these flanderous words, to wit, he (intending the said Earl) is sorry for that (meaning that the said Earl was sorry that he was then a Subject to our said Sovereign Lady the Queen) that is his grief (meaning that it was grief to the said Earl, that the said Earl was subject to the Queen) to the damage of the said Earl of 20000 l. To which the said Sir Thomas Stanhop said, that a Question was formerly moved between the said Earl and the Defendant, touching the Subversion and drawing away of certain Weares heretofore erected by the said Sir Thomas at Shelford, in the said County of Nottingham, where the Action was brought to oust the River of Trent there, and that for the subversion thereof a Petition was exhibited to the Privy Council of the Queen, before the speaking of the said words, by certain Inhabitants of the County of Lincoln, and divers other places not known to the Defendant, with the privity, allowance and knowledge of the said Earl, which Petition at the time of the speaking of the said words, depended before the said Council not determined; whereupon at the day and place comprised in the Declaration, there was Communication

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tion between the said Defendant and the said **Francis Fletcher** concerning their purpose to have the said Wears subverted, and touching the said Petition, upon which the said **Francis** said to the Defendant, the matter (meaning the Petition aforesaid, hanging undetermined before the Council aforesaid) is to be heard before the Privy Council (meaning the aforesaid Council of the Queen) and what their Honours (meaning the Council aforesaid) determine, my Lord (the aforesaid Earl meaning) will willingly obey : To which the said **Francis** then there answered, saying, My Lord (the aforesaid Earl meaning) is a Subject, upon which the said Defendant (they then having speech as well of the said Petition, as of the Order thereupon to be taken by the said Council) answered saying, the words comprised in the Declaration, meaning that he was sorry, and grieved that he was subject to the Order to be made upon the Petition aforesaid by the said Council, and averred that this was the same Speech upon which the Action was grounded : upon which it was demurred in Law, and for cause shewn according to the Statute it was alledged that the Bar was defective, because it is not alledged at what place, nor by whom, nor against whom the Petition was exhibited ; and also because that by the Bar the matter of the Declaration is not confessed, avoided or traversed, and also that the Bar was insufficient : And it seemed to **Fennoz**, that the matter of the Bar had been sufficient if it had been well pleaded : but the Plaintiff alledged the words to be spoken in one sense in the Affirmative, and the Defendant shews matter also in the Affirmative which proves the words to be spoken in another sense than the Declaration imports, and two Affirmatives can never make a good Issue, and therefore the Defendant ought to have taken a Traverse to that which is comprised in the Declaration, and for want of this Traverse the Plea in Bar is not good.

Cawdy said, that the Bar is not sufficient neither in Matter nor Form; not in Matter, because that whereas **Fletcher** said, that the said Earl was a Subject, this can have no other sense, but that he was a Subject to the Queen in his Allegiance and her Sovereignty, and so much is drawn out of the course of their former Speech, and therefore the Answer which the Defendant made to it refers to his Subjection of Allegiance, and not to the matter of Obedience, which he owed to the Order of the said Council, and if it cannot have any other sense in good Understanding, he cannot help himself now by an **Innuendo**, which is in it self according to common intendment, contrary to that which the nature of the words in themselves do purport : And if it had been good for the Matter, yet it is not good for the Form, for want of a Traverse, for without the Traverse the Plea is not answered in that Case which is laid to the charge of the Defendant.

But **Popham** and **Clench** held strongly to the contrary, and that this Bar is good in Matter, and (as the Case is) cannot be otherwise, and that the Form also is good enough, and yet the two Affirmatives cannot make a good Issue : but in case of two Affirmatives, a Traverse shall not be, but where the Affirmatives do not agree in one. As if the Defendant in **Trespass** entitles himself by the Feoffment of a Stranger, and the Plaintiff reply, and maintain that the same Stranger did enfeoff him, this cannot make a good Issue without a Traverse of the Feoffment alledged to be made to the Defendant.

But in the same Case if the Plaintiff saith that true it is, that the Stranger enfeoffed the Defendant, but this was to the use of the Plaintiff and his Heirs, there no Traverse shall be on the Plaintiffs part, because as to the matter of the Feoffment it agrees with the Defendant, in which Case it shall not take any Traverse, but there the Traverse shall come on the Defendants part to maintain the Feoffment to his own use; **Absque hoc**, that the Feoffment was to the use of the Plaintiff, for now that which the Defendant saith, (albeit it be in the Affirmative) yet it is a Traverse to that which the Plaintiff hath alledged, and therefore he needs

not traverse the Plea : And so a Diversity where the Affirmative is, to traverse that which is alledged by the other party, and where not, for in one Case the Conclusion shall be with a Traverse, and in the other not : Then in this Case when the Plaintiff alledged that the Defendant spake these words, which *prima facie* shall be intended to be spoken in this sense, as the Plaintiff hath alledged, although no *Innuendo* had been in the Case, for if it shall not be so intended without the *Innuendo*, the *Innuendo* will not help it, yet when the Defendant hath declared the circumstance whereupon these words were spoken, and then the speaking of them thereupon, now he hath confessed the very words themselves to be spoken, but upon the Circumstance discovered to be in another sense than *prima facie* they are to be taken, and therefore he shall not take a Traverse, for he acknowledgeth the very words, but not the Intentment which the very Law *prima facie* presumes upon the words, and therefore shall not take a Traverse : for this Intentment of Law being answered by matter expressly in the Plea shall never be traversed, as in the Case put of a Feoffment, *prima facie*, it shall be intended to be to the use of the Feoffee, yet when the other Party maintains that this Feoffment was to his use, he shall not take a Traverse to that which the Law intends and presumes.

And if a Man upon Speech had with an Hunter, saith, *That he hath murdered all the Hares within seven Miles of his House*, and another answer and say, *he is a Purtherer indeed*, whereupon the Hunter brings an Action upon the Case against him, for saying, that the Plaintiff was a Purtherer, the Action will well lie.

Yet when the other shall discover the Communication whereupon the words were spoken, this shall be a good Bar without a Traverse, yet if it be true that there were no such Communication between the Parties as is mentioned in the Bar, the Plaintiff then hath good cause of Action, and therefore he may well say, *De injuria sua propria absque tali causa*, and this being found it shall be against the Defendant.

So upon Speech of a Butcher who had killed a thousand Oxen in a year, and one hearing it will say, that *he is a notable Purtherer*, this upon the matter disclosed is not Actionable.

And it shall be mischievous by a Traverse or by pleading generally Not guilty, to put such special matter in the mouth of Lay-people to give their Verdict upon, being ignorant, and therefore easie to be miscarried in their Judgment, and therefore it shall be the rather admitted by special pleading to be put to the Judgment of the barred Judges, than in the mouths of Lay-Gents.

And here when Fletcher speaking of the order to be taken by the Council, upon the Petition said, that the Earl would obey their Order, to which the Defendant answered, that he knew not what the Earl would do, the said Fletcher said thereupon, that he was a Subject, and what was the intent of Fletcher in saying so? no other, but that because he was a Subject, therefore he ought to obey ; and if it be so to be understood, as of necessity it ought, (or else they were not spoken by Fletcher to any purpose, which cannot be intended) then shall the words following (being spoken thereupon by the Defendant) be taken to be spoken in Answer to the matter of the Speeches spoken by the said Fletcher, and this is, that he was sorry, and it was his grief that he must be so subject as to be bound thereby to obey their Order : as if a Man saith to another, *that he was sorry that he was so subject, that he must obey a Judgment against him in the Queens Court*, this is no cause of Action, for this tends but to his subjection to the Law, or good Order, or the like, which do not give cause of Action : As if

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one faith of another, *that he is of the Temple, who always rebel against the Governozs of the said House*, then saith another to him, *Will you say and maintain that he is a Rebel?* Yea, says one of the other, *I will do so;* If an Action be brought for the last words, the Action will lie, but if the other discover the Circumstances of the Speech in the Bar, whereupon it was spoken, the Action will not lie: And this the Defendant may well do without traversing that which is alledged, because he acknowledgeth it, although in another sense, then the Law *prima facie* imports upon the Declaration.

And if in Speech between two, one of them faith of a Stranger, *that he hath treacherously betrayed his Friend in revealing all his Secrets, and Counsels,* whereupon the other then faith, *that he hath done as a Traytor therein,* and the other faith to him again, *he is a Traytor,* and he answering to it, saith, *true, he is a Traytor;* Now if the Stranger brings an Action of the Case against him, for saying of these last words, *prima facie*, it imports the good cause of Action, without any *Innuendo*, as that he intended thereby that he was a Traytor to the Queen, because the words in common intendment have such a sense, yet upon the matter disclosed by way of Bar, with the Circumstances how they were spoken, the Plaintiff shall be barred, if he cannot maintain that they were spoken without such a cause, which alters the Intendment that the Law hath otherwise of the words.

And *Gawdy* agreed also, that in such Cases the Defendant may plead the general Issue, and upon the mitter also the Jury ought to find him Not Guilty.

But *Popham* and *Clench* said, that this was a dangerous matter to be put in the mouths of the Lay-Gents, as hath been said before, and therefore to put it to the Judgment of the Law by pleading.

And for the Exception they ought to have shewn here, where, by whom, and against whom the Petition was delivered, to this they said, that the Exception was to no purpose, for this was but a Conveyance to the Speech used, which Speech was the substance of the Bar; and in this they put the Case of the Lord *Cromwel* which was in this Court, 22 Eliz. Rot. 752. in an Action upon the Statute of *Scandalum Magnatum*, by him brought against *Thomas Dye Clark*, for saying to the Lord *Cromwel*, *It is no News though you like not of me, for you like of those that maintain Sedition against the Queens Proceedings;* in which the Defendant said, that he was Vicar to North Linham, in the County of Norf. and that the Plaintiff mentioned one *Vincent Goodwyn Clark*, at such a time, and one *John Trendle* at such another time, neither of them being licenced to preach in the said Church, against the Will of the said Defendant, and shew how they severally preached there in their Sermons (and shew certainly in what point) *Seditious Doctrine* against the *Laws of the Church, as against the Crols used in Baptism, and the wearing of the Surplice,* and that afterwards in Speech thereupon between the said Plaintiff and him, the Plaintiff said to the Defendant, *That the Defendant was a false Knave,* and said in English words, *that he liked not of the Defendant;* whereupon the Defendant said the words comprised in the Declaration *Innuendo*, *That he liked of the said Goodwyn and Trendle who maintain Sedition (Innuendo) seditious Doctrine against the Queens Proceedings. Innuendo predicti. Leges & Stat. Ecclesie buss regni Angl. &c.* And the Plaintiff was put to answer, *Scilicet de injuria sua propria absque tali causa, &c.*

And note in this Case, the Defendant would first have justified for the matter preached by one, and it was not allowed by the Court, but he was put to speak to both, or otherwise it had not been good, because his Speeches were in the Plural Number, to wit, *That he liked of those, which refers to more than to one.* And it was said in this Case, that the word (*Subject*) might have several significations according to the Circumstance whereupon it is spoken: As Subject generally without more, is to be intended of the Queen, but according to the Circumstance, it may be said Subject of England, or Subject of Ireland, or Subject to

to the Law, or subject to any other Authority, or Power set over him, or subject to his Affections.

And if a Man saith of another, that he is a Subject, and therefore he ought to serve the Queen in her Wars, and he answers, that he is sorry for that, and is grieved for it, no Action will lie for this, because the Grievance refers to Service, which is to be done, and not to his Subjection as a Subject.

Dillon *versus* Fraine.

See this in Coke 9. **I**n Trespass brought by William Dillon Esquire, against John Fraine, lib. t. 120. b. the name of Chudleigh's Case. for breaking of his Close at Tavestock in the County of Devon, called Seden, upon Not Guilty, and a special Verdict, the Case appeared to be this, to wit, that Sir Richard Chudleigh Knight was seised in his Demesne as of Exe, of the Mannor of Hescot, with the Appurtenances, in the County of Devon, of which the said Close was parcel, and so seised, 26 April 3. & 4. Phil. & Mar. by his Deed of Feoffment, of the same date enfeoffed Sir Tho. Saintleger Knight, and others, and their Heirs, of the said Mannor, to the use of the said Sir Richard Chudleigh and his Heirs of the Body of the said Elizabeth, then the Wife of Richard Bainfield Esquire, lawfully begotten, and for default of such Issue, then to the use of the said Sir Richard Chudleigh, and of his Heirs of the Bodies of their Wives, of other Persons lawfully begotten: And for default of such Heirs, then to the use of the Performance of the Will of the said Sir Richard Chudleigh for ten years after his Death, and after the said Term finished, then to the use of the said Sir John Saintleger and his Co-heirs and their Heirs, during the life of Christopher Chudleigh, Son and Heir Apparent of the said Sir Richard, and after the death of the said Christopher, then to the use of the first Issue Male of the Body of the said Christopher, and to the Heirs Males of the Body of this first Issue Male, and for default of such Issue, to the second Issue Male of the Body of the said Christopher, and to the Heirs Males of the Body of this second Issue Male, and so to the tenth Issue Male: And for default of such Issue, then to the use of Thomas Chudleigh, another Son of the said Sir Richard, and of the Heirs of his Body lawfully begotten: And for default of such Issue, to the use of Oliver Chudleigh, another Son of the said Sir Richard, and of the Heirs of his Body lawfully begotten: And for default of such Issue, to the use of Nicholas Chudleigh another Son of the said Sir Richard, and of the Heirs of his Body lawfully begotten, and for default of such Issue, to the right Heirs of the said Sir Richard Chudleigh for ever; whereby they were seised accordingly, after which the 17th of November, 5 & 6. Phil. & Mar. the said Sir Richard died without any Heir of the Body of any of the Wives before-mentioned: And after that the said Christopher took to Wife one Christian Strecheley, after which, to wit, the 14th day of August, 1. Eliz. the said Sir John Saintleger and the other Feoffees, by their Deed of the same date, enfeoffed the said Christopher of the said Mannor, to have and to hold to him, and his Heirs for ever, to the use of the said Christopher and his Heirs, the said Oliver Chudleigh then being living, after which, to wit, the 20th day of September, 3. Eliz. the said Christopher had Issue of his Body lawfully begotten, one Strechley Chudleigh his first Issue Male, And after this, to wit, the 30th day of March, 5. Eliz. the said Christopher had Issue of his Body lawfully begotten, one John Chudleigh his second Issue Male, after which, to wit, the first day of July, 6. Eliz. the said Christopher by his Deed indentured of the same date, and introlled within six Months, according to the Statute bargained and sold the said Mannor to Sir John Chichester Knight, and to his Heirs, and in the interim also between the date of this Deed, and the Introlment thereof, to wit, the 6th day of July, in the same sixth year, by his Deed of the same date, the said Christopher enfeoffed the said Sir John Chichester and his Heirs of the said Mannor, and by the same Deed warranted it for him and his Heirs,

to the said Sir John Chichester and his Heirs, whereupon the said Sir John Chichester entered into the said Mannor, after which, to wit, the first day of October, 12 Eliz. the said Christopher died, after which, the 7th day of November, 13 Eliz. the said Strectley Chudleigh died without Issue of his Body: And after the death of the said Sir Richard Chudleigh, to wit, the 6th day of September, 7 Eliz. the said Sir John Chichester enfeoffed one Philip Chichester and his Heirs of the said Mannor, to the use of the said Philip and his Heirs.

And the said Close being Copy-hold and Customary Land of the said Mannor demisable by the Lord of the same Mannor, or his Steward, for the time being, for Life or Lives by Copy of Court-roll, according to the custom of the said Mannor.

The said Philip at a Court holden at the said Mannor, for the said Mannor, the 8th day of December, 15 Eliz. by Copy of Court-roll granted the said Close to the said John Frain, for term of his life, according to the custom of the said Mannor, after which, to wit, the 11th day of March, 28 Eliz. the said John Chudleigh being now Heir to the said Christopher, enfeoffed the said William Dillon of the said Mannor, to have and to hold to him and his Heirs, to the use of the said William and his Heirs for ever, whereby he entered, and was seised, until the said John Frain entered into the said Close upon him, the 8th day of February, 30 Eliz. upon which Entry of the said Frain this Action is brought.

And for difficulty of the Case it was adjourned into the Exchequer-Chamber before all the Justices and Barons of the Exchequer, and there it was agreed by all, that a Warranty descending upon an Infant shall not bind him, in case that the Entry of the Infant be lawful into the Land, to which the Warranty is united: But the Infant ought in such a Case to look well that he do not suffer a Descent of the Land after his full Age, before he hath made his Re-entry, for then the Warranty, when he is to have an Action for the Land, shall bind him.

And they agreed also that a Copy-hold granted by a disseisor, or any other who hath the Mannor of which it is parcel by wrong, shall be avoided by the disseisor, or any other who hath Right to the Mannor by his Entry or Recovery of the Mannor.

And so by Popham it was agreed by the Justices in the Case of the Mannor of Hasselbury Brian, in the County of Dorset, between Henry late Earl of Arundell, and Henry late Earl of Northumberland: but then he said, that it was agreed, that Admittance upon Surrenders of Copy-holders in Fee, to the use of another, or if an Heir in case of a Descent of a Copy-hold were good, being made by a disseisor of a Mannor, or any other who hath it by Tort, because these are Acts of necessity, and for the benefit of a Stranger, to wit, of him who is to have the Land by the Surrender, or of the Heir: And also Grants made by Copy by the Feoffee, upon Condition of a Mannor, before the Condition broken, are good, because he was lawfully Dominus pro tempore.

And for the matter upon the Statute of 27 H. 8. what shall become of this future Use limited to the first, second, and other Issues Males not in Este at the time of the Feofement.

Ewens, Owen, Bateman and Fenner said, That an Use at Common Law is Use, what it is, no other than a Confidence which one Person puts in another, for a Confidence cannot be in Land, or other dead thing, but ought always to be in such a thing which hath understanding of the Trust put in him, which cannot be no other than such an one who hath Reason and Understanding to perform what the other hath committed to him, which Confidence shall bind but in Privity, and yet the Confidence is in respect of the Land, but every one who hath the Land is not bound to the Confidence, but in Privity shall be said to be in the Heir

Heir, and the Feoffee who hath knowledge of the Confidence, and in him who cometh to the Land by Feoffment without Consideration, albeit he hath no knowledge thereof, and yet every Feoffee is not bound although he hath knowledge of the Confidence, as an Alien Person, Attaint, and the like, nor the King, he shall not be seised to another's use, because he is not compellable to perform the Confidence; nor a Corporation, because it is a dead Body, although it consist of natural Persons: and in this dead Body a Confidence cannot be put, but in Bodies natural.

And this was the Common Law before the Statute of 27 H. 8. Then the Letter of the Statute is not to execute any Use before that it happeneth to be an Use in Esse; for the words are, Where any Person is seised to the use of any other Person, that in such a Case, he who hath the Use shall have the same Estate in the Land which he had before in the Use; Ergo, by the very Letter of the Law he ought to have an Estate in the Use, and there ought to be a Person to have the Use before the Statute intends to execute any Possession to the Use, for the words are express, that in every such Case he shall have it, therefore not another: And therefore the Statute had purpose to execute the Uses in Possession, Reversion, or Remainder, presently upon the Conveyance made to the Uses: But for the future Uses which were to be raised at a time to come upon any Contingent, as to the Infants here, not being then born, the Statute never intended to execute such Uses until they happen to have their Being, and in the mean time to leave them as they were at Common Law, without meddling with, or altering of them in any manner until this time, and if before this time, the Root out of which these contingent Uses ought to spring be defeated, the Use for this is utterly destroyed, and shall never afterwards have his Being; as here by the Feofiment made by the said Sir John Sainteger and his Co-Feoffees, who then were but as Tenants pur autre vie, to wit, for the life of Christopher, and which was a Forfeiture of their Estate, and for which Oliver Chudleigh might have entered, it being before that the said Strectley or John Chudleigh were born, the Priority of them from Estate being the Root out of which this future Use ought to have risen is gone and destroyed, and therefore the Contingent Uses utterly thereby overthrown.

As if before the Statute of 27 H. 8. Tenant for life had been, the Remainder over in Fee to an Use: If the Tenant for life had made a Feofiment in Fee, and he in the Remainder had released to the Feoffee, the Use had been gone for ever, so in all these Cases of Contingent Uses at this day, for he who cometh to the Possession of Land by Disseisin, or wrong done to the Possessor who is seised to another's use, shall never be seised to another's use.

And the Case being so, that it is out of the Letter of the Statute to execute such Contingent Uses, it is more strong for them out of the meaning of the Statute to execute, than before they happen to be in Esse: for this shall be to make all Mischiefs comprehended in the Preamble of this Statute, and against which the Statute intended to provide sufficient Remedy in a worse Mischievous than they were before the making of the same Statute, and this shall be but a perverse Construction of the Statute.

And they said, that the Subtilties used from time to time by means of those Uses, to the great deceit and trouble of the People, were the cause of the making of this Statute, 27 H. 8. and by all the Statutes formerly made touching Uses, it appeareth that they were all taken to be grounded upon fraudulent and crafty devises, and therefore this Law had no great purpose to favour them, but a Fortiori, not to make them in worse case by means of the Statute than they were before, and therefore it shall not be taken that the Use is executed by the Statute, which stands upon a Contingency, of which a greater mischief will ensue, than there was in such a Case before the Statute, and therefore by the Feofiment made in the interim, before the Birth of the Infants,

fants, which otherwise ought to have preserved the Use, this Use was utterly destroyed; and although the Feoffee of Christopher had notice of the Use, yet this doth not now help in the Case, because the Feoffment did wrong to the Estate first settled, which was subject to the Use, and extinct in the same possibility which had been otherwise in the Feoffees to have given Livelihood to the said Contingent Use: And therefore the Judgment by them ought to be, that the Plaintiff shall be barred.

Walmesley, That the great mischief which was at Common Law upon these Feoffments to Uses, was, that none could know upon the Occupation of the Land, who was true Owner of the Land, for Cestuy que Use was the Pernor of the Profits, but in whom the Freehold or Inheritance of the Land was, there were not many which knew, whereby great mischief came to the Assurances which Men had of Land which they purchased, and by it Men knew not against whom to bring their Actions to recover their Rights, and by it Wives lost their Dowers, Husbands their Tenancy by the Courtesie, Lords their Escheats, Wardships, and the like.

And this mischief happened by reason that one had the Profit, and another the Estate of the Land: And the Statute was made to put the Land and the Estate quite out of the Feoffee, who before did not meddle with the Land to Cestuy que Use, who before had but the Occupation and Profits of the Land, and to this intent the letter of the Law serves very well, which says that the Estate of the Feoffee shall be clearly in Cestuy que Use, and therefore nothing by the intent and letter of the Law is now to remain in the Feoffee, no more than a Scintilla juris memor'd in Brent's Case in my Lord Dyer, Eliz. and the whole Estate in the interim until the Contingent happen shall be in them who have their Uses in Esse, and when the Contingent happen, the Statute gives place to this Contingent Use, and by the Execution thereof comes between the Estates before executed, and as out of thele by the Statute, but nothing is now after the Statute in the Feoffees, for the purpose of the Statute was (as I have said) to take away all from the Feoffee, for all was devested from him, because that bewixt the Feoffor and the Feoffee was all the Fraud before the Statute, and the very letter of the Statute is to extinguish and extirpate the Assurances fraudulently made, which was alway by reason of Assurances made between the Estate of the Land in one, and the Possession thereof in another, and to cause that now that the Estate shall be to the Use, where the Occupation was before: And this Statute was not made to extinguish or discredit Uses, but to advance them, as by bringing the very Estate in Possession to the Use, and by it the Trust now taken from all others who were trusted with it before, so the Statute doth not condemn the Uses, but the Fraud which was by reason of them before. And the Statute being, that the Estate, Right and Title of the Feoffees shall go to the Uses, therefore nothing remaineth in the Feoffees, but all by Authority of Parliament adjudged to be in Cestuy que Use, which is the highest Judgment that can be given in any Court, and the words (Stand and be sealed at any time) refer as well to the future, as present Uses, and the Statute intended as well to help the Uses which shall be upon any Contingent, as those which are at present, for a future or contingent Use is to be said an Use, according to its nature or quality, and it shall be executed according to its quality when it happen. And the words are, that the Estate which was in the Feoffee shall be in Cestuy que Use and not the Estate which is, and therefore when the Use happeneth to be in an instant, the Estate which at the first Livery was in the Feoffee, to this Use, shall now be executed in Possession to this contingent Use, albeit it self was altogether executed (as I laid before) in the Uses which were in Esse, and if so, it followeth that nothing which is done in the mean time by the Feoffee or can be done by any other, can prejudice or hurt the Execution of this Use in Contingency when the Contingency happen.

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And

And for the Case of Brook, 30 H. 8. it is plain in point, which is this.

A Covenant with **B.** that if **B.** enfeoff him of three Acres of Land in **D.** that then the said **A.** and his Heirs, and all others seised of such Lands shall stand thereof seised to the use of the said **B.** and his Heirs, after which **A.** enfeoffed a Stranger of this Land, after which **B.** enfeoffed the said **A.** of the said three Acres, now the Use shall be to the said **B.** and his Heirs of the said other Land, for the Statute so binds the Land to this Contingency when it happens, that by no means it can be defeated, and this is the cause that Leases made by force of Provisoes comprised in Assurances are good, and cannot be avoided, for the Interests to these Leases are wrought by the first Livery and the Statute, and therefore upon the matter, I conceive, that Judgment ought to be given for the Plaintiff.

Gawdy conceived that it is executed by the intent, but not by the letter of the Statute, for the purpose was to remove all the Estate from the Feoffee, and to put in Cestuy que Use wholly, to wit, in Possession, to the Uses which were in Esse, and in Aleynance as to the Uses which were to come and contingent; and now by the same Statute the Contingency of the Possession shall go in Licence of the contingent Use, and now an Use limited to one for life, with Remainder over to the Heirs of the Body of I. S. or to the first Son of I. S. shall be in the same manner as if Land at this day had been letten to one for life, with Remainder over to the Heirs of the Body of I. S. or to the first Son of I. S. and not otherwise, for the quality which he had in the Use, the same (by the very letter of the Statute) he shall now have in the Possession and Estate of the Land, and the Statute is not to undo any Use, but to transfer an Estate in the Land to the Use.

But he said, That by the Feoffment made to Christopher, the contingent Remainder which was devested in Derechley and John Chudleigh depending upon the Estate which Sir John Hantlegier and his Co-feoffees had for the life of Christopher, is utterly gone and destroyed in the same manner, as where a Lease is made for life, the Remainder to the right Heirs of J. H. or to the Heirs of the Body of J. H. if the Tenant for life dies, or aliens, whereby he makes a Forfeiture, and determines his Estate in the life of the said J. H. his Heir shall never have the Land by the Remainder afterwards, because he was not in Esse, as an Heir at the time when the Estate ended, for there cannot be a Remainder without a particular Estate, neither can it stand or be preserved.

And as in this Case without a particular Estate of Free-hold, a Remainder cannot be, no more in the Case now in question, being now become by means of the Statute, as if it had been an Estate executed in Possession; and for this cause only he conceived, that Judgment ought to be given against the Plaintiff.

And Clench agrēd with this Opinion in all, and both of them agreed, if there be none to take the Use according to the Limitation at the time, when it falleth to be in Possession, that he shall never take it, although it happen to be in Esse afterwards.

Clark said, that Uses were not at Common Law, but grew by sufferance of time, as appeareth by the words of the Statute it self, and the mischief and subtlety which was before this Statute was not in the Fine, Feoffment, or other Assurances of Land, but by means of the Uses limited thereupon, contrary that which was used in the ancient course of the Common Law, and the Statute was made to reduce the Common Law to its ancient force and course, and therefore ought to conceive such a Construction, as may agree with the purpose of the Makers of the Statute, and therefore the best Construction of this Statute is, not to execute other manner of Uses, but in some Cases to extinguish them, as where it is such, as will make the Case in as ill, or worse condition than it was before the making of the Statute.

It hath been agreed by all, that the Statute doth not execute any Use which was suspended at the time of the making of the Statute, as by reason of a Disseisor, or the like happening before; and if it doth not execute the Use which is in suspense for the Right which he had in the Use, how can it execute the Use which hath not any being? for in such Cases of Infants not born as here, until they be in *natura*, the Use cannot have any Being.

And in the same manner in all Cases where the Use is not to rise but upon a future Contingent: And what god shall this Statute do, if these leaping Uses shall arise without being impeached? Nothing, but always nourish a Viper in the Bosom of the Law, which is quite against the intent of the Makers of the Statute.

The Law was made to preserve Peace amongst the Subjects, and to assure their Possessions, as many other Statutes did, that were made about this time, as the Statutes of Fines, Wills, and others. But if the Exposition of this Statute shall be as the other side hath taken it, it will make the Confusion which will happen thereupon intolerable, and much worse than it was before the Statute was made, and (as Walsh said) if no Assurance can be made to be forcible against a contingent Use, this will make it worse than it was before.

And he said, that it was not to be compared to the interest of Lands to begin at a time to come, nor to the Case where a Man devise that his Land shall be sold, in which Case, he shall not be impeached by any manner of Assurance, to be made in the mean time by the Heir, and the reason is, because the Vendee takes by the Will under the Estate of the Heir, and not by the Sale, and therefore upon the matter, he conceived that the Plaintiff ought to be barred.

Periam said, That Uses were at Common Law, and to prove it, he vouch'd 24 H.8. abridged in Book. And he said, That there have been always Trusts, Ergo, Uses ab initio, but they had not such estimation at the beginning as they have had by continuance of time, and so it was of Copy-holds: And these Uses at Common Law bind but in privity according to the Trust, but do not bind in the Possession of him who cometh to the Land in the Post: But now by the Statute all Trusts are gone, and the Estate of the Land it self transferred to the Use, and now the Use guides the Land, and not the Land the Use.

And the Statute did not intend to destroy any Use, but to bring it back to the Possession, according to the course of the Common Law, and to avoid the Fraud.

And as before the Statute the Use it self in such a Case of Contingency was in Obeyance for the time, so now the Estate it self is in Obeyance by the Statute, which wills, that he shall now have an Estate in the Land it self, of such a quality as he had before in the Use; for the Statute puts all clearly out of the Feoffees, and it is not inconvenient to have a Possession so to a contingent Use, and if it had not been in the words of the Statute, yet (as hath been said) it shall be so taken by the intent of the Statute; for it never was the intent of the Makers of the Statute to do wrong to any by means of the Statute. And therefore he put the Case of Cramner, who made a Feoffment to the use of himself for his life, and after his decease to the use of his Executors for years, this Estate for years is not now vested in any, because a Man cannot have an Executor during his life, and yet it remains as in the custody of the Law, until there are Executors to take it.

And he said, that the Case of the Lady Bay was as strong to prove the Case in question, to be, as he takes it, which cannot be answered, for if she had married with the Lord Bay by the Assent of the Council assigned for it, according to the Agreement, she had taken an Estate by the Contingency, but in as much as she did not do it, it was otherwise.

And we are to consider well, what we do in this Case, it is a Tree, the Branches whereof over-shadow all the Possessions of the Realm in effect, for

the Estates and Leases in manner of all stand upon those Assurances to Uses, and to pull up such a Tree by the Roots, is to put all the Realm in a Confusion, and therefore if there be any mischief therein, it is better to help it by Parliament, than to alter it by Judgment. And so upon the whole matter, I conceive that Judgment ought to be given for the Plaintiff.

Anderson. That an Use was not at Common Law, for the Common Law had no respect to it, but to the Feoffee, and it was the Person who by the Law had any thing to do in the Land, and not *Cestuy que Use*, for he might punish *Cestuy que Use* for his meddling with the Land, and *Cestuy que Use* had no Remedy against him by no means ; But by Subpoena in the Court of Conscience.

And further, an Use being limited to another in Fee, no Use can be limited further thereupon for any Estate. And it hath been well said, that the letter of the Statute of 27 H. 8. did not tend to execute this Use which was not in Esse, and for the intent thereof that it did not tend to execute any contingent Use until that it happen, which is proved by the Case, that an Estate for years being assigned over, or granted to an Use, the Use of this is not executed by the Statute of 27 H. 8. as it was agreed about 27 Eliz. and what was the reason in the Case, but because there was not any Seisin in the Use, but only a Possession to the Use : whereby the words of the Statute are much to be regarded. And here how can there be a Seisin to the Use which is not ? it cannot be, and therefore for the like reason, as in the other Case, it is never executed, nor shall be removed by means of such an Use, until it happeneth to be an Use in Esse.

And for Brent's Case, I have always taken the better Opinion to be, that the Wife cannot take in the Case for the mean Disturbance, notwithstanding the Judgment which is entered thereupon, which was by Assent of the Parties and given only upon a Default made after an Adjournment upon the Demurrer, for he said, that he had viewed the Roll thereof on purpose, and if it be, that such a contingent Use be not executed until it happeneth to be in Esse, here it appeareth, that by the Feoffment Christopher is in of another Estate which was not subject to the Use, because he is in by Forfeiture and Wrong made to this Estate, and therefore not bound to the Use in Contingency, although he made it without Consideration, and although he had notice of this contingent Use, and therefore this contingent Use utterly defeated before it had any Being.

But in all the Cases put on the other side, it doth not appear that there was any thing done in disturbance of these mediate Uses before they happened, and therefore not to be compared to this Case, whereby he conceived that the Plaintiff ought to be barred.

Popham said, That in as much as the manner of Assurance made by Sir Richard Chudleigh may seem strange, and in some manner to touch the Reputation of the said Sir Richard (who was a grave and honest Gentleman) to those who hear it, and do not know the reason why he did it, which I remember to be this as I have heard, *to wit*, That the said Christopher had killed one Buller a Gentleman of good Reputation, whereupon he fled into France, and the said Sir Richard doubting what would become of his Estate, if he should die before he had settled his Land, and yet having a desire to have power to undo the Assurance which he purposed to make, if he pleased, his Council then thought the best way to make and devise the Assurance, so, that such an Estate of Inheritance might thereby be in him, which could not descend to the said Christopher, and yet such, that he might thereby undo the Assurance made by the Recovery when he pleased, and yet such also as should never take effect in any of the Issues of his other Wives, to the prejudice of his right Wives, because he never had a purpose to marry with any of these Wives.

And

And to that which hath beene touched by Periam, that this Limitation first made is a Fee-simple in Sir Richard, I conceive clearly the contrary, For if it should be so, then no Use could be limited over upon this Fee-simple, as hath beene said before, and therefore all the Remainder of the Cale had beene to no end; but he said, that it was an Estate-tail speciall in Sir Richard, and denied the Opinion of Aylcough taken so in 20 H.6. and this by reason of the Stat. of Donis conditionalibus, which wills Quod voluntas donatoris secundum formam doni in charta doni manifeste expressam de cetero obseretur. And here it is express, that the Heirs of Sir Richard begotten upon any of the said Wives shall have the Land, and thereby it shall be understood that his Heirs shall be intended by common Intendment the Heirs by him. To which Opinion Anderson agreed.

And for the matter, Popham conceived clearly that there was not any such Use at Common Law as we commonly call an Use, and yet he acknowledged there were always Trusts at Common Law; but every Trust is not to be said an Use: for none will doubt but that a Trust may be, and is many times put in others at this day, as upon Purchases made in other Men's names, and Assurances also upon Trust, and yet we will not say that this is an Use, and without doubt such Trusts were at Common Law, but not the Uses aforesaid, and the reasoun that moved him to take the Law to be so, was, that he had not seen any ancient Record, Statute, or Book of Law, nor any Writing before the time of C. 3. which made any mention of this word Use; and if it had been at Common Law, without doubt (as they said) some mention would have been made thereof. The reasouns which are alledged in 27 H. 8. and in the Case vouched 24 H. 8. that a Trust was at Common Law is, by the one of them the *Causa Patrimonii prælocuti*, which (as they pretend) ought to prove that there was a Trust at Common Law.

And the other the Statute of Marlbridge, that the Lord in Case of Wards against Feoffments made by Collusion, which Feoffments (they alledge) prove that a Trust then was.

To which it was said, that the Gift made by a Woman to another, to the intent that he shall marry her, hath in it a Condition more properly implied, to wit, that if he does not marry her, that she shall have her Land back again, for which the Common Law gives her Remedy by the Action aforesaid, for if it had been but a Trust, no Remedy had been by the Common Law.

And for the Statute of Marlbridge the contrary thereunto is manifestly proved, for the Statute speaks but of Feoffments made to Heirs Apparent or upon Condition, or to the intent to enfeoff the Heir at his full Age, or the like, in which Cases the Use always goes with the Possessions, and is not to the Feoffor: And the Statute of 4 H. 7. was made in vain, which gives the Wardship of *Cestuy que use* where no Will is declared, which had not been needful if Feoffments within the Statute of Marlbridge had been said to have been to Uses.

And without doubt if those who made the Statute of Marlbridge had then had knowledge of these Feoffments to Uses which were so mischievous, and more than the other Feoffments by Collusion, they then would have provided Remedy for these Cases of Uses.

Also the Statute de Religiosis ordains that *Nec arte, nec ingenio*, Lands shall not be conveyed in Mortmain, and thereby it was conceived that a full Provision had been made against these Mortmains, and yet in 15 H. 2. Provision was made against Uses conveyed in Mortmain to Religious or other Corporations of which they took the Profits.

And

And without doubt those who were so precise in the making of the Statute of Religiosis against Mortmains, would also have made Provision for the Usles if they had then been known.

But to clear this Point, without all controversy the Statute it self of Usles, 27 H. 8. makes it plain, which saith expressly that by the Common Law of the Realm, Lands or Tenements ought not to pass from one to another, without solemn Livery, matter of Record, or Writing, and that these Feoffments to Usles were Errors used and accustomed within the Realm, to the Subversion of the ancient Laws; therefore it stands not with the ancient Common Law of the Realm, as all the Parliament took it, which is more to be regarded than any Book vouches. But see how, and when they began and crept in at Common Law, and it shall be easily perceived (as it hath been well said by some of those who argued to this Point at the beginning) that they began by two means, to wit, by Fraud, and by Fear. And he said, that the first Book which he had seen in all the Books of the Law, which tend to an Use, is the Case of 8 Assise, which makes mention that the Conusee of a Fine entered into the Land in the Right of another, which is to be taken to another's Use. And in the Quadragessimas of Edw. 3. mention is made of the Feoffees of the Lord Burglath, who sued to the King by Petition, and by the Statute of 50 E. 3. cap. 6. mention is made that divers gave their Lands to their Friends to have the Profits, and afterwards fled to privileged places, and lived there to the hindrance of their Creditors; And therefore it was provided that in such a Case Execution shall be made, as if no such Assurance had been made. And by 2 R. 2. these are called Feoffments to Usles, and made by Craft to deceive Creditors, and there is the first mention which is made in any Statute of the Word (Use:) So Fraud hath been always the chief foundation of these Usles; yet in time they began to have some Credit in the Law. And this was when Men saw that the Court of Conscience gave Remedy in these Cases against such who had not the Conscience themselves to perform the Trust put in them, and to take away the danger which happened to an infinite number of good Subjects, upon the Carboyls which happened between the time of E. 3. and that of King H. 7. caused that in effect, all the Possessions of the Realm were put in Feoffments to Usles. And the first Case in the Law which speaks of this word (Use) which he ever saw was (as he said) in 5 H. 4. And the like Case by Gascoign, 7 H. 4. no Remedy is given by the Law for Cestuy que use, and afterwards it crept into the Law as appeareth, yet as an Error of long time used: And if before the Statute of 27 H. 8. a Lease had been made for life, the Remainder in Fee to the use of B. for life, the Remainder to the use of the first Son of the said B. and so further as here:

If the Tenant for life had made a Feoffment in Fee to a Stranger, and had not given the Stranger notice of the Use, and all this were without Consideration, and afterwards he in the Remainder in Fee to the Use had released all his Right to the said Stranger, every one of them had been hereby without Remedy for their Usles: Were the Son of B. born before or after this Wrong done: So if it were at Common Law before this Statute as hath been well said, and the Law being so before this Statute, then he said it was to be seen what was to be done in the Case after the Statute, which will stand altogether upon this, what will become of these contingent Usles to the Sons not born at the time of the said Feoffment made by Sir John Sainteger and his Co-feoffees, by this Statute of 27 H. 8. and it seems to him clearly that no Possession is executed to any contingent Use by this Statute, until it comes in Being; and that as the Case is here and in some other special Cases it shall never be executed: And one cause why such a contingent Use shall not be executed, is, because it doth not stand with the letter of the Law, but rather is against the letter.

Another

Another Cause is, because it is utterly against the intent of the Law to execute it, as the Case is here. It doth not stand with the letter of the Statute, for this is, Where any Person or Persons stand seised to the use of any other Person or Persons, &c. And it is clear that none can stand seised to the use of him who is not, neither can he who is not in *natura* have any Use, therefore the Case here doth not stand with the letter of the Statute to be now executed.

And further, the words following are, that in every such Case, every Person who hath such an Use in Fee-simple, Fee-tail, for life, for years, &c. or otherwise in Remainder or Reversion shall stand hereafter seised and adjudged in lawful Estate and Possession of the Lands, &c. of such an Estate as he had in the Use: The words then in the Statute being so precise as they stand, to wit, that in such Case he who hath such an Use shall have the Possession executed of such an Estate as he had in the Use, excludes all other who are not in it, to have it to be executed until that they happen to be in the same Case as of that which the Statute speaks. And if they had intended to have the Possession to be executed and transferred from the Feoffees to these contingent Uses, they would have made some mention thereof as well as they did of Reversions and Remainders, and they did not leave there, but mention this again, to wit, that the Estate, Right, Title and Possessions which was in such Person or Persons which were seised to the use of any such Person or Persons, shall be hereafter clearly adjudged in him, or those that had or have such Use according to such quality, manner, form and condition as he had before the Use which was in them, by which it appeareth plainly, that the Right and Possession of the Feoffee shall not be vested in or to any, until that he hath the Use it self; for it is said, that it shall be in him, therefore they ought to have something in the Use by the very express Letter of the Statute, before any thing of the Possession shall be executed or transferred by this Statute from the Feoffee to Cestuy que use: And how can this be said to be within the letter of the Statute, which hath so many and so precise words and branches against it? And therefore it is clear, that if the Feoffee to Use were seised at the time of making of this Statute, that the Use shall not be executed by this Statute, until there be a Regress made by the Feoffee, or in his Right to revive the former Use, and it had been out of the letter of the Statute.

But to this I say, that how precise soever the Letter is against the Execution of these contingent Uses, the intent thereof is yet more strong and precise against them, which I will prove clearly by the Statute it self, which is of greater Authority than the particular Opinion or Concieit of any Judge whomsoever, for it is the Judgment of all the Judges, and all the Realm also which ought to bind all, and to which all ought to give Credit. And to take the intent, the Statute was full that it was made (as is rehersed) for the Disinherition which before was to true Heirs; for the defect which before was in the assurance of Purchases, for the Mischiefs, in regard before Men did not know (by reason of these Uses) against whom to bring their Actions to recover their Rights. To avoid Perjury that it should not be so common as it was, by reason of the maintenance and support of these secret Uses, for the relief of the King and other Lords, as to their Escheats, Forfeitures, Wardships, Releases, and the like, for the mischief which before happened to Tenants by the Courtesie, and in Dower, by reason of these Estates in Use; and finally for the great Inconveniences which happened by reason of them, to the great trouble and unquiet of the People: These were the great mischies that were before the making of the Statute, and these were the things for which the Statute intended to provide Remedy, and if the Exposition shall be as hath been on the other side, these mischiefs shall be on every part more mischievous by much, than it was before the making of the Statute, and that in such a manner, that it shall be impossible to help any of them but by Parliament; whereas always the god and true Construction of a Statute is to constrain

constrain it, so that it shall give Remedy to the mischief which was before, and not to make it more mischievous, and therefore examine it by Parts.

And as to the Dis-inherison of two Heirs, it appears now that by such Exposition more inconveniences will arise, and that in a more dangerous degree than before the Statute; for before, for the Use the Heir had his Remedy in Conscience according to the Trust, and he might have made a Disposition of the Land it self, by the Statute of R. 3. as an Owner, for the advancement of his Wife and Children, and for payment of his Debts, and the like. But as the Case is now used by means of these Perpetuities (as they are called) if the Exposition of the other side shall hold place, the true Heir shall not only be continually in danger to lose his Inheritance, but by them the very Bowels of Nature it self shall come to be divided, and as wrent in pieces, for by reason of these the Inheritants themselves cannot make any competent Provision for the Advancement of their Wives, Daughters, or youngest Sons, as every one according to the course of Nature ought to do, nor by reason of this can he redeem himself if he were taken Prisoner: And this will make Disobedience in Children to their Parents, when they see that they shall have their Patrimony against their Will, whereby such Children often times become unnatural and dissolute, of which I in my time have seen many unnatural, dangerous and fearful Consequences, not convenient to be spoken of. And it stays not there, but it causeth mortal debate (as to Blood) between Cousin and Cousin, Brother and Brother, and not so only, but between the Father himself and his Children, of which every one of us have seen the experience, for the one ought to be as a watch upon the other, to see when any thing happen to be done, to give him advantage to dis-inherit the very true Owner.

And I say, that it is impossible that any can keep his Possessions which hath them tied with these Perpetuities, if the Exposition of the Statute should hold place which the other side hath made. And I affirm precisely, that there is not any one in England who hath had such Possessions so bound by Descent of Inheritance by five years of any value, but that he hath lost all, or part of his said Land at this time, let him be never so precise in making his Assurances, and yet he is not sure to have one skilful in the Law always at his Elbow when he is to meddle with his Land. And therfore I put but this Case.

One who hath such a Perpetuity with power to make Leafes, rending the ancient Rent, or more, hath two Farms, either of them of the ancient Rent of 20 s. a year, but the one is worth 60 l. a year, and the other but 20 l. these are in hand to be better together, rending 53 s. 4. for both together, therefore he hath lost all, or part of his Land, according to that of which the Perpetuity is; so it is evident that it will happen to be more mischievous in time to come, and therefore by this Exposition much more to the Dis-inherison of the Heir, than it was before the making of this Statute. And which is more mischievous, if a Feme putet happen to be in such an House who happen to have Children in Adultery, these Bastards shall have the Land against the Will of the Father, to the utter disinherison of the true Heirs, and against the intent of him who made the Limitation, by which we may see the just Judgment of God upon these who attempt by Humane Policy to circumvent the Divine Providence of God for the time to come; and of this also I have seen an Example.

And now to the Mischief, that Men do not know against whom to bring their Actions to sue for their Rights, and it is clear, that now by such an Exposition they shall be now in much worse Condition than they were before, for before the Action was given against him who received the Profits, which is now gone by this Statute in the Cases of Free-hold, and therefore if the other Exposition shall hold place, it is clear that until the Statute of 13 Eliz. Men

Men might have been by means of this Statute put out of all Remedy to recover their Rights by any manner of Action, as some put it in practice, as to make Feoffments to the use of the Feoffor, and his Heirs, until any intend to bring an Action against him for this Land, and then over to others upon the like Limitation, with a Proviso to make it void at his pleasure, and the like, and what mischief shall then be for the time upon such an Exposition? such, that Justice thereby cannot be done to the Subject; and what an absurdity shall it be to say, that such an Exposition can stand with the intent of the Makers of the Law?

And to that which hath been argued on the other side, and first to that which was said by Walmesley, That the Right, Estate and Possession is wholly out of the Feoffee, and vested to the Uses, which have their Being by the Statute, and that upon the Contingents-happening, their Estates uncouple and give place to the contingent Use then executed, and that the Execution thereof shall be by a Possession drawn to it out of the Possession which was before executed by the Statute in another: I say, that this Statute can by no means have such an Exposition; for this is as much as to say, that an Use may arise upon an Use, contrary to what is adjudged, 36 H. 8. That a Bargain and Sale by a Deed indented, and enrolled, cannot be at this day of Land to one, to the Use of another.

And if a Man enfeoff another to the use of J. D. and his Heirs, and if J. D. pay such a sum, that then the said J. D. and his Heirs shall be seised of the same Land to the use of the said J. D. and the Heirs of his Body: J. D. pays the Money, yet the Use doth not rise out of the Possession of the said J. D. But if it had been, that upon the payment the first Feoffee and his Heirs shall stand seised to the use of the said J. D. and the Heirs of his Body, it shall be otherwise; therefore something remains to the first Feoffee in the Judgment of the Law.

And I remember, that when I was a Counsellor at Law in the time of the Lord Dyer, where a Feoffment was made to the use of one for life, with Remainders over, with restraint to alien, and with power given to Tenant for life to make Leases for one and twenty years, or three Lives, it was much doubted whether this power so limited to him without words in the Assurance that the Feoffee and his Heirs shall stand seised to these Uses, shall be good to make such Leases, or not? And therefore suppose that a Man bargains and sells Land to one for his life by Deed indented and enrolled, and make therein a Proviso, that the Tenant for life may make such Leases, this is to no purpose as to power to make a Lease, but the strongest Case which he put was, that of 30 H. 8. which I agreed to be Law, as it is there put, whether it were before or after the Statute of 27 H. 8. for it is not there put that the Feoffment was made upon any Consideration to the Stranger, in which Case, although he had no notice of the first Covenant, yet in such a Case he shall take the Possession subject to the Use, to which it was bound by the present Covenant: But if you consider the Case well, you shall see that it was a Case before the Statute, for it followeth presently in the same Case, that it is there said, that it is not like the Case where the Feoffees in Use sell the Land to one who hath no notice of the first Use, whereby it appeareth that it was a Case before the Statute, for otherwise there had been no cause to have spoken then of the Feoffees to an Use, and by the same it appeareth, if the Covenanter had bargained and sold the Land to another, the same Use had never risen upon the Covenant, and therefore it is clear against the Law, that the Possession shall be bound with such an Use in whosoever's hand it comes.

And to that which Periam said, in the Case of these contingent Uses, they shall now by the Statute be in the same degree, as if Land it self had been so conveyed; and that now the Land shall be in Contingency instead of the Use, and that by such manner it shall be executed, and that by such means all is utterly out

of the Feoffees, because the Statute was made to determine all matter of Trust to be hereafter reposed in any Feoffee : this is well spoken, but not well proved ; for as I have said before, it is an Exposition quite contrary to the letter and intention of the Law. And I agree, as hath been said, if there be none to take the Use at the time that it falleth to be in Possession, according to the Limitation, that he shall never take it afterwards, no more of an Use upon the Statute than of an Use at Common Law : As if an Use be limited for life, the Remainder to the right Heirs of J. S. if the Estate for life be determined in the life of J. S. the Remainder shall never vest afterwards in the right Heirs of J. S. no more than if an Estate had been so made : But this makes for me, *to wit*, that the Estate upon the Uses executed by the Statute, shall be of the same condition as Estates in Possession were at Common Law, and that they being executed ought also to be such, of which the Common Law makes Allowance.

And by way of Argument, I agree for the time that it is, as hath been said by them who maintain that an Use may be in suspence, as to that which is an Use in its proper nature, for it is not properly said an Use, until that it be said in *Cesse*, to take the Profits themselves : But I am to return this Argument against him who made it ; for if it be so, the Use can never be in suspence, and if so, it follows that no Possession by means of any such Use can be in suspence, but stays where it was before to be executed when the Use happens to be in Being.

But as to that, that a Reversion or Remainder may be of that which we call an Use, so also may such an Use be in suspence in the same manner as the Possession it self, but not otherwise.

And as to Cramner's Case formerly put, the Law is so, because nothing appeareth in the Case to be done, to the disturbance of this contingent Use in the interim before it happen. But upon the Case put of the Lady Bray, upon which it hath so strongly relied, it was thus.

The Lord Bray made an Assurance of certain Lands, to the use of certain of his Council, until the Son of the said Lord Bray should come to the age of 21 years, for the Livelyhood of the said Son, and of such a Wife as he shall marry with the assent of the said Council, and then to the use of the said Son and of the said Wife, and of the Heirs of the Body of the said Son : The Father dies, the Son was become in Ward to the King, after which one of the said Counsellors dies, the King grants over the Wardship of the said Son, after which the said Lord Bray by the assent of his Guardian, and of the surviving Counsellors marries the Daughter of the then Earl of Shrewsbury, after which the Husband alienes the same Land to one Butler, and dies, and upon Action brought by the said Lady against the said Butler for the same Land, she was barred by Judgment, and upon what reason ? because she was not a Person known when the Statute was made, which must be in every Case of a Freehold in Demesn, as well in case of an Use, as in case of a Possession.

And therefore a Lease for years, the Remainder to the Heirs of J. S. then living, is not good, and the same Law of an Use. And so it was agreed by all the Justices very lately in the Case of the Earl of Bedford, but in these Cases it remaineth to the Feoffor ; and because it doth not appear at the time of the Assurance who shall be the Wife of the said Son, so that there was not any to take the present Free-hold by name of the Wife of the Son, she takes nothing by the Assurance, but this Reason makes for our side ; to wit, That if there were none to take the Free-hold in Demesn from the Use, when it falleth, he shall never take it.

The other Reason in this Case was, because she was not married by the consent of all the Counsellors, for that one was dead, nor according to the power given by the Agreement, but by the Authority of the Guardian, that the power which the Father had upon his Son was ceased.

And

And Nota, That by a Difceilin the contingent Use may be disturbed of his Execution ; but there by the regress of the Feoffee or his Heirs when the Contingent happen it may be revived to be executed : But by the Release of the Feoffee or his Heirs, the Contingent in such a Case by Popham is barred of all possibility at any time to be executed.

And to that which hath been said, that the general and universal Assurances of Men throughout all the Realm at this day are by means of Uses, and that it shall be a great deal of danger and inconvenience to draw them now in question or doubt, and that it now trencheth upon all the Possessions of the Realm, and therefore it shall be too dangerous to pull up such Trees by the Roots, the Branches whereof are such, and so long spread, that they overshadow the whole Realm.

Popham said, That they were not utterly against Uses, but only against those, and this part of them which will not stand with the publick Weal of the Realm, and which being executed shall make such an Estate which cannot stand with Common Law of the Realm, or the true purport of the Statute ; and therefore he said, that it was but to prune and cut off the rotten and corrupt Branches of this Tree, to wit, that those which had nor their Substance from the true Sap, nor from the ancient Law of the Realm, nor from the meaning of the Statute, and so to reduce the Tree to its Beauty and Perfection.

The same Reason he said, might have been made in the time of Edw. 4. against those Arguments which were made to maintain the common Recoveries to bar Estates Tail. But if such a Reason had been then made, it would have been taken for a bare Conceit and meer Trifle, and yet Uses were never more common than Estates Tail were between the Statute of Donis conditionibus, and the said time of E. 4. But the grave Judges then saw what great trouble happened amongst the People by means of Intails, and what insecurity happened by means thereof to true Purchasers, for whose security nothing was before found (as we may see by our Books) but collateral Warranty, or infinite delay by Woucher ; and thus did the Judges of this time look most deeply into it, whereupon, upon the very Rules of Law it was found that by common Recovery with Wouchers these Estates Tail might be barred, which hath been great cause of much quiet in the Land until this day, that now it begins to be so much troubled with the Cases of Uses, for which it is also necessary to provide a lawful Remedy.

But he said plainly, That if the Exposition made on the other side shall take place, it will bring in with it so many mischiefs and inconveniences to the universal disquiet of the Realm, that it will cast the whole Commonwealth into a Sea of Troubles, and endanger it with utter confusion and drowning.

And to that which was said, That a Remainder to the right Heirs of J. S. or to the Heirs of the Body of J. S. or to the first Son, as here are, so in the custody of the Law that they cannot be drawn out, and that therefore no Forfeiture can be made by the Feoffment made by him who hath the particular Estate.

To that he said, That a Difceilin made to the particular Estate for life draws out such Remainders to the right Heirs, as is proved expressly by 3 H. 6. where it is holden, that a Collateral Warranty bars such a Remainder in Obeiance after a Difceilin.

And by Gascoigne, 7 H. 4. If such a Tenant for life makes a Feoffment in Fee, it is a Forfeiture, but he conceived that in the life time of J. S. none can enter for it, but this is not Law ; and when by the Feoffment the particular Estate is quite gone in Possession, and in Right also, the Remainder shall never take effect, by the very Rules of Littleton.

And by 27 H. 7. which is, That the Remainder cannot be, unless there be an Estate upon which it may have dependency, which there it cannot ; but in the Case of a Difceilin made to a particular Estate, it is otherwise, because there the

Estate remains in Right. And to say that it shall not be a Forfeiture, because the Feoffment was made to **Christopher**, who then had the Fee-simple which was limited to the right Heirs of Sir **Richard Chudleigh**, this is not so, for by 41 **C.3.** The Tenant for life himself, who also had a Remainder in Fee-simple in himself, depending upon a mean Estate Tail in another made a Feoffment, and by it committed a Forfeiture to him in the Remainder in Tail.

But if Tenant for Life, Remainder in Tail, Remainder in Fee, enfeoff him in the Remainder in Tail, this is a Surrender of his Estate for the immediate Estate which was in him; whereupon this Term, Judgment was given in the King's Bench for **Straine** the Defendant, against **Dillon** who was Plaintiff. And it is entred, **Hill. 31 Eliz. Rot. 65.**

Bayne's Case.

Burglary.

10. **A**T the Sessions holden at **Newgate** presently after this Term the Case was this; one **Baynes** with another came in the night time to a Tavern in **London** to drink, and after they had drank, the said **Baynes** stole a Cup in which they drank in a Chamber of the same House; the Owner of the said House, his Wife and Servants then being also in the House, and the Cup being the Owner's of the said Tavern, whereupon he was indicted and committed, and this matter appeared in the Indictment, and agreed by **Popham**, **Anderson** and **Perriam**, with the Recorder and Serjeants at Law then being there, that this was not Burglary, and yet it was such a Robbery, whereby he was ousted of the benefit of his Clergy by the Statute of 5 **C. 6.** cap. 9. and was hanged.

In which Case
Shops in Lon-
don are Mar-
kets Overt, and
what not.

11. **A**ND at the Sessions then next ensuing then holden, upon one who had stolen a Silver Basin and Ewer of the then Bishop of **Worcester**, and Sale made openly in the day in a Scrivener's Shop in **London** to a Stranger, the Question was demanded of the Court whether the Property were changed by this Sale, so that the Bishop shall not have his Plate again, because it was alledged that they prescribed that every one of their Shops in **London** are good Markets overt through all **London** every day in the Week but **Sunday**; But agreed by **Popham**, **Egerton**, **Anderson**, **Perriam**, and others skilful in the Law then being there, that such a general Custom is not good, and that this Sale made there, albeit it were openly in the Shop, so that every one passing by might see, it shall not bind the Property as it shall do in Market overt; for a Scrivener's and Cutler's Shop, or the like, is not proper for the Sale of Plate, nor a place to which men will go to seek for such a thing lost or stollen; But a Gold-smith's Shop is the proper Shop for it, as the Draper's Shop is for Woollen Cloth, or the Mercer's Shop for Silk, and the like: and to such Men will go to seek for things of the like nature that are lost or stollen, and not to a Scriveners Shop, or the like.

And they agreed also that a private Sale made in the Shops which are proper to the nature of the thing sold, so that the Passers by cannot in Reason see it in their passage, cannot bind, for Reason (upon which the Law is founded) will not admit any such Custom.

Hillary

Hill. 37 Eliz. in the King's Bench.

Westby *versus* Skinner and Catcher.

¶ **I**n Debt by Titus Westby Plaintiff, against Thomas Skinner and John Catcher, late Sheriffs of London, Defendants, for 440 l. upon Nihil in Cote, 3. Re-debet pleaded, and a special Verdict found, the Case appeared to be this, to wit, One Anthony Bustard with others, were bound in a Recognizance in the nature of a Statute-staple of 440 l. to the Plaintiff, whereupon the Plaintiff sued Execution out of the Chancery against the said Anthony and the others that were bound with him for the Bodies, Goods and Lands of the said Obligors which Writ of Execution was delivered to the said Defendants the 8th day of Prisoners in September, 30 Eliz. the Defendants then being Sheriffs of London, and the Execution to be delivered said Anthony being then in Newgate in Execution, in the Custody of the said Defendants for 240 l. at the Suit of one Robert Deighton, and that afterwards, charged and removed from their said Offices, and Hugh Osley and Richard Halconstall were then made Sheriffs of London, and that the said Anthony being in Execution for the one and the other Debt, the said Defendant the said 20th day of October by Indenture delivered the said Anthony to the said new Sheriffs in Execution for the said Debt of the said Robert Deighton, not giving them any notice of the said Execution made for the Plaintiff, and suffered the said Anthony to go at large: And whether the Defendants shall be charged for this Escape was the question.

And the Escape was alleged by the Declaration to be suffered by the said Defendants the said 20th day of October, 30 Eliz. and it was moved by Tanfield, that the new Sheriffs ought to take notice of their Prisoners remaining in the Goal, at their coming into their Office, at their peril, and ought to enquire and search for the Causes that they then were in Custody, and not to deliver them of their own head without due course of Law.

And he put the Case, That if the old Sheriff had been dead, in the mean time before the new Sheriffs had been made, shall this be an excuse to the new Sheriffs that they had no notice for what cause this Anthony had been in Prison, if they suffer him to escape? And he said that it shall not, no more here; but per Curiam the new Sheriff shall not be charged with this Escape, as to the 440 l. of which they had no notice; for if this Case which was private in the knowledge of the ancient Sheriff only upon a Writ directed to them at the Suit of any Party, the new Sheriffs cannot by Indentment have any knowledge, unless it be given to them by the old Sheriff, to whom the Writ of Execution was directed and delivered.

And the Case of one Dabridgecourt, who was Sheriff of Warwick, and had one in Execution whom he kept in a private Prison by himself, for all his Executions in the Town of Warwick; and when he was discharged of his Office, and a new Sheriff made, Dabridgecourt said to the new Sheriff, That he had such an one in Execution in his Custody, and offered to the said Sheriff to put him in the Indenture amongst his other Prisoners delivered to the new Sheriff, but would have had the said old Sheriff to have sent for the said new Sheriff to have taken him into his Custody, but the new Sheriff refused to receive him, unless Dabridgecourt would deliver him into the common Goal of the County, which was in the Town of Warwick, whereupon afterwards the Prisoner escaped: And Dabridgecourt was charged with this Escape, and not the new Sheriff, for he is not compellable to take the Prisoners of the Delivery of the old Sheriff, but in the common Goal of the County, and the old Sheriff remains chargeable with the Prisoner, until he be lawfully discharged of him, and if the Sheriff dies, the Party shall be rather at a prejudice, than the new Sheriff,

riff, without Cause charged with him. And in such a Case the Party who sued the Execution may help himself, to wit, by the remanding of the Body by a Corpus cum causa, whereby he may be brought to be duly in Execution, and this under a due Officer.

And Anderson, Periam, and other Justices were also of Opinion, that the said Skinner and Catcher are to be charged with the Escape in the principal Case, whereupon Judgment was given for the Plaintiff, which was entered, Hill. 34 Eliz. Rot. 169. in the B. R.

Fulwood *versus* Ward.

2. **I**n a Writ of Annuity brought in the Common Pleas by George Fulwood Plaintiff, against William Ward Defendant, the Case was thus.

The Queen was seised of a Barn and Tithes of Shretton, in the County of Stafford, for the life of the Lord Paget, and being so seised, demised it by Letters Patents, dated 21 June, 29 Eliz. to the said William Ward for 21 years, whereupon the said Ward by Writing dated, 30 June, 29 Eliz. granted to the said Plaintiff an Annuity or yearly Rent of 10 l. out of the said Barn and Tithes for 15 years then next ensuing, payable yearly upon the 8th day of November, with Clause of Distress. The Lord Paget died the first day of March, 32 Eliz. and soz the Arrearages after his death, the Plaintiff brought this Writ of Annuity, and soz the difficulty thereof in the Common Pleas, the Case came this Term to be argued before all the Justices and Barons at Scrivants Inn in Fleet-street, where it was agreed by Walsiley, Fennor and Owen, that the Annuity was gone by the Determination of his Estate in the Land who made the Grant, for they said that presently upon the Grant made as before it was a Rent-charge, for by such a Rent granted in Fee, the Fee shall be in his Heirs, albeit the Grantee dies before any Election made; and such a Rent is payable from the beginning at the Land, as appeareth by 12 E. 4.

And by Grant of Omnia, terras, tencimenta, & hereditamenta, such a Rent will pass, ergo, it is a Rent-charge and not an Annuity until the Election made, and by the Determination thereof in the nature of a Rent, the Election is gone, as by Babington and Martin, 9 H. 6. by the Recovery of Land charged with such a Rent by elder Title, the Annuity is gone as it seems by their Opinion, and by them and by Littleton upon a Rent-charge granted with Proviso, that he shall not charge the Person of the Grantee, it will exclude the Charge of the Person, which proves that the Land is charged Originally, and not the Person, for otherwise the Proviso would be void for the Repugnancy; And if so, whensover the Land is discharged, as by Purchase, Descent, or the like, the Person thereto is also discharged, and therefore the Judgment here shall be, that the Plaintiff shall be barred.

But by the Chief Justices, chief Baron, and all the other Justices and Barons, the Plaintiff ought to have Judgment in this Case to recover the Annuity, for the Law gives him at the beginning an Election to have it as a Rent or an Annuity, which matter of Election shall not be taken from him, but by his own deed and folly, as in case where he purchase part of the Land charged, in which case by his own Act he hath excluded himself of his Election. But if a Feoffee upon Condition grant a Rent-charge, and presently break the Condition, whereupon the Feoffee re-enter, shall not the Feoffee be charged by Writ of Annuity, surely it shall be against all reason that he by his own Act, without any folly of the Grantee, shall exclude the Grantee of his Election which the Law gives at the beginning.

And they denied the Opinion of 9 H. 6. to be Law; But if the Disseisor grant a Rent-charge to the Disseelee out of the Land which he had by the Disseisin

Disseisin by his Re-entry, before the Annuity brought, the Annuity is gone; for this was his own Act, yet in effect all of them agreed, that Prima facie, it shall be taken as a Rent-charge, of which the Wife shall be endowed, as hath been said, which pass by Grant of Omnia hereditamenta, and which is payable at the Land; but the reason is, because it is expressly granted out of the Land, and also for the presumption of Law, that it is more beneficial for the Grantee to have it in such a degree, than in the other. But neither the presumption of Law, nor the express Grant thereof as a Rent, shall not take away from the Grantee the benefit of his Election, where no default was in him, but that upon his Election he may make it to be otherwise, *ab initio*. And therefore by Popham, If a Rent-charge be granted in Tail, the Grantee may bring a Writ of Annuity, and thereby prejudice his Issue, because that then it shall not be taken to be an Intail, but as a Fee-simple conditional, *ab initio*. And if a Term for two years grant a Rent-charge in Fee, this as to the Land is but a Rent-charge for two years, and if he avow for it upon the Determination of the Term, the Rent is gone, but by way of Annuity it remains for ever, if it be granted for him and his Heirs, and Assets descend from him who granted it.

And if a Rent-charge be granted in Fee, and doth not say for him and his Heirs, if the Grantee brings his Writ of Annuity, the Heir shall never be charged therewith, yet if he had taken it as a Rent-charge, the Land had been charged with it in perpetuity.

And by him the cause why the Proviso that he shall not charge the Person of the Grantor upon the Grant of a Rent-charge is good, is, because the Person is not expressly charged by such a Grant, but by Operation of Law.

But in such a Case, a Proviso that he shall not charge his Land is merely void for the Repugnancy, because there the Land is expressly charged by precise words, and therefore if it be expressly comprised in such a Grant, that the Grantee may charge the Land, or the Person of the Grantor, at his Election; provided then afterwards that he shall charge his Person, is not good, *Causa patet*.

And all agreed, that upon a Rent granted upon equality of Partition, or for allowance of Dower, or for recompence of a Title, an Annuity doth not lye, because it is in satisfaction of a thing real, and therefore shall not fall to a master personal, but always remains of the same nature as the thing for which it is given. And afterwards the same Term Judgment was given in the Common Bench, that the Plaintiff shall recover, which is entred, &c.

And in the same Case Clark vouched that it was reported by Benloes in his Book of Reports; where a Rent was granted out of a Rectory by the Parson who afterwards resigned the Parsonage, that it was agreed in the Common Pleas in his time, that yet a Writ of Annuity lies against the Grantor upon the same Grant, to which all, who agreed on this part, agreed that it was Law.

Butler *versus* Baker and Delves.

3. *A Trespass brought by John Butler against Thomas Baker and Thomas Delves, for breaking his Close, parcel of the Mannor of Thoby, in the County of Essex, upon a special Verdict, the Case was thus.* See this Case in Coke 3. Report 35.

William Barnes the Father was seised in his Demesne as of Fee, of the Man-
nor of Hinton in the County of Gloucester, holden of the King by Knights Ser-
vice in Capite, and being so seised, after the Marriage had between William
his Son and Heir Apparent, and Elizabeth the Daughter of Thomas Eden Esq;
in consideration of the same Marriage, and for the Joyniture of the said Eliza-
beth, assured the said Mannor of Hinton, to the use of the said William the
Son,

Son, and Elizabeth his Wife, and the Heirs of their two Bodies lawfully begotten and died, by whose death the Reversion also of the said Mannors descended to the said William the Son, whereby he was seised thereof accordingly, and being so seised, and also seised of the Mannor of Thoby, in his Demesn as of Fee holden also of the Queen by Knights Service in Chief, and of certain Lands in Fobbing in the said County of Essex, which Land in Fobbing with the Mannor of Hinton, were the full third part of the value of all the Land of the said William the Son, and he made his Will in Writing, whereby he devised to his said Wife Elizabeth his said Mannor of Thoby for her life, in satisfaction of all her Joyniture and Dower, upon condition, that if she take to any other Joyniture, that then the Devise to her shall be void, and after her decease he devised that the said Mannor shall remain to Thomas his Son, and the Heirs Males of his Body, and for default of such Issue, the Remainder to Thomas, Brother of the said William, for his Life, the Remainder to his first, second and third Son, and to the Heirs Males of their Bodies, and so to every other Issue Male of his Body; and for default of such Issue, the Remainder to Leonard Farners his Brother, and to the Heirs Males of his Body, the Remainder to Richard Farners and the Heirs Males of his Body, the Remainder to the right Heirs of the Devisor: William the Son dies, having Issue Thomas his Son, and Grisell his Daughter, Wife to the said Thomas Baker; the said Elizabeth by Parol in Pais moved her Estate in the said Mannor of Hinton, and after this entred into the said Mannor of Thoby, after which the said Elizabeth died, and Thomas the Son, and Thomas the Uncle died also without Issue Male, after which the said Leonard took one Mary to Wife, and died, having Issue Anthony Farners, after which the said Mary took the said John Butler to Husband, and after this the said Anthony assigned to the said Mary the said Mannors of Thoby, in allowance for all her Dower, whereby the said John Butler as in the Right of his Wife entred into the said Mannor of Thoby, whereby the said Thomas Delves by the Commandment of the said Baker entred into the said Close, of which the Action is brought as in Right of the said Grisell; and whether this Entry were lawful or not, was the Question, which was argued in the Court, in the time of the late Lord Wray; and he, and Gaudy held strongly that the Entry of the said Delves was lawful, but Clench and Fennor held always the contrary, whereupon it was adjourned into the Exchequer Chamber.

But they all agreed, that the Waiver made by the said Elizabeth by Parol in pais, was a sufficient Waiver of her Estate in Hinton, and the rather, because of the Statute of 27 H. 8. cap. 10. the words of which are; That if the Joyniture be made after the Marriage, that then the Wife surviving her Husband may after his death refuse to take such Joyniture.

And now it was moved by Tanfield, that Judgment ought to be given for the Plaintiff, for by the Waiver of the Wife, the Inheritance of Hinton is now to be laid wholly in the Husband ab initio, and therefore that with Fobbing being a whole third part of the whole Land which now is to be laid to be left to descend to the Heir of the Devisor, as to Thoby; is good for the whole, and if so then no part thereof descends to Grisell, and therefore the Entry of the said Delves in her Right is wrongful.

Coke Attorney-general to the contrary, for he said, That it is to no purpose to consider what Estate the Devisor had in the Mannor of Hinton, by reason of this Waiver made by his Wife, ex post facto, after his death. But we are to see what Estate the Devisor had in it in the view of the Law, at the time of his death before the Waiver, and according to it the Law shall adjudge that he had power to make his Devise by means of the Statute; and at this time none can adjudge another Estate in him but jointly with his Wife, of which Estate he had no power to make any Disposition, or to devise it, or to leave it for the third part to his Heir, for the Statute which is an Explanatory

natory Law in this point) says, that he ought to be sole seised in such a Case. And further the Statute of 34 H. 8. at the end, is, that the Land which descends immediately from the Devilor shall be taken for the third part, and this Land did not descend immediately, for it survived to the Wife until she waived it, and therefore this Land is not to be taken for any third part, which the Statute purposed to have been left to the Heir, and therefore so much shall be taken from Thoby as with Fobbin shall be a third part to descend, whereby Grisell the Heir hath good Right yet to part of Thoby, and therefore the Entry of the said Delves in her Right by Commandment of her Husband not wrongful.

Periam Chief Baron, Clench, Clark, Walmesley and Fennor, That now by reason of the Waiver in the Devilor shall be sole seised ab initio, for the said Elizabeth might have had Dower thereof, if she would, as in the like Case it is adjudged in 17 E. 3. 6. and therefore a sole Seisin in the Husband, and the Descent to the Heir in such a Case upon the Waiver, shall take away the Entry of him who hath Right to it. And therefore the Case now for the Manor of Hinton is within the very letter of the Statute, as well for the sole Seisin which was in the Devilor, as for the immediate Descent which was from the Devilor to his Heir, and therefore remains to the Heir for a good third part of the Inheritance of the Devilor, by the very Letter of the Statute, and if the Letter had not helped it, yet it shall be helped by the purport and intent of the Statute, which ought to be liberally and favourably construed for the benefit of the Subject, who before the Statute of Ulises might have disposed of his whole Land by reason of Ulises by his Will, and the Statute of 27 H. 8. excludes him thereof, and therefore the Statute of 32 & 34 H. 8. are to be liberally expounded as to the Subject for the two parts, and the rather because it appeareth by the Preamble of the Statute of 32 H. 8. that it was made of the Liberality of the King, and because that by 34 H. 8. it appeareth that it was made to the intent that the Subject shall take the advantage and benefit purposed by the King in the former Statute, by all which it appeareth (as they said) that the said Statutes shall be liberally expounded for the advantage of the Subject, and for his benefit, and not so strictly upon the letter of the Law as hath been moved; and so they concluded that Judgment ought to be given for the Plaintiff.

Popham and Anderson the two Chief Justices, and all the other Justices and Barons held the contrary, and that Judgment ought to be given against the Plaintiff; and that by the very letter and purport of the Statutes of 32 & 34 H. 8. for they said, they are to consider what Estate the Devilor had in the Land at the time of this Devil made, without regard to that which might happen by matter Ex post facto upon the Deed of another: and if it had been demanded of any apprised in the Law, at the time when the Will was made, what Estate the Devilor then had in the Manor of Hinton, none is so unlearned to say, that he had other Estate in it, then jointly with his Wife: And if so, it follows that this Manor was then out of the letter and intent of the Law, for he was not then sole seised thereof, nor seised in Co-parcenary, nor in common, and by the words he should be sole seised in Fee-simple, or seised in Fee-simple in Co-parcenary, or in common: It appeareth that the intent of the Statute was, that he shall have full power of himself, without the means or aid of another, to dispose of the Land, of which he is by the Statute to make disposition, or to leave it to his Heir, and this he hath not for the Manor of Hinton here.

And further, the words of 32 H. 8. are, That the Devilor hath full power at his Will and pleasure to devise two parts of his Land so holden as here, and this is to be intended of such Land of which he then had full power to make Disposition, and this he could not then do for the Manor of Hinton.

And further the words of 34 H. 8. are that the Division for the parts shall be made by the Devisor or Owner of the Land by his last Will in writing, or otherwise in writing and in default thereof by Commission, &c. And can any say with reason, that it was the intent of the Statute that he shall make the Division of other Lands than of those of which he then had full power to devise or to leave to his Heir without any future Accident to help him, or the mean of Anthony by matter Ex post facto; It is clear that Reason cannot maintain it. And the words following in the Act, which are, That the King shall take for his third part the Land which descended to the Heir of the Estate Tail, or of Fee-simple immediately after the death of the Devisor, much enforce the Opinion on this side, for it cannot be said upon the death before the Waiver that this Pannor of Hinton was immediately descended, ergo, it ought not to be taken for the third part.

And further, the words are, If the Lands immediately descended upon the death of the Devisor, &c. do not amount to a full third part, that then the King may take into his hands so much of the other Lands of the Devisor as may make a full third part, &c. whereby it is clear, that in this Case if the Wife had not waived her Estate for ten years after the death of the Devisor, that for all this time the Queen could not meddle with the Pannor of Hinton, and therefore in the mean while she might well have so much of the Pannor of Thoby, which might well have made a full third part to her, and for so much which she took the Will was always void, which shall never be altered nor made good by any Waiver Ex post facto. And although the Waiver of the Feme put the Inheritance entirely in the Devisor, and in his Heirs, in relation to divers respects, yet as to other respects he shall not be said in them with such Relation, and especially upon the Statute in which we now are to respect the Power as it was in him at the time of his death, before this future Contingent.

And by Popham, If the Exposition on the other side shall hold place upon the Statute, perhaps a Man shall not see by the space of six years, or more, after the death of a Devisor, how his Devise shall work: As a Feoffment in Fee is made to J. S. and a Feme Covert, and their Heirs, of 10 L. Land holden by Knights Service in Capite, which J. S. hath 20 L. Land in Fee so holden also; J. S. makes a Devise of his 20 L. Land, the Husband lives 60 years after; none will or can deny but that for this time the Devise is not good for two parts, now the Husband dies, and the Wife waives the Estate made to her, this puts the Inheritance thereof in the Heir of J. S. with relation to divers respects, but not to this respect to make the Will now good for the whole 20 L. Land, which therefore was void for the third part thereof, for the Will which once was void by matter Ex post facto, after the death of the Devisor, cannot be made good: And by him the Descent in such a Case is not such that it shall take away the Entry of him who hath Right, because it was not an immediate Descent in Deed, but upon the Operation of Law which gave Wardship and the like, but not to prejudice any third Person.

And he said, that although the Queen, or other Lord upon Eviction of the Land descended, or the Determination of the Estate thereof, may resort to Lands devised or assured, and take a third part thereof, yet thereby the Devise or Assurance remains effectual against the Heir, but this is by a special Clause in the Statute of 34 H. 8. which gives it to them, but no such Remedy is given to the Devisee to help him if his part be abridged, or evicted: And the words are precise, to wit, If the part left or assigned to the King, or to any Lord, at any time during their Interest therein be evicted, &c. that they shall have so much of the two parts residue, as shall make a full third part of the Remainder not evicted, &c. Whereby it appeareth, that this is given only for the benefit of the Lords, and not of the Heir, nor of the Devisee; for if after the Interest of the Queen, or other Lord be determined, this which was left

be evicted from the Heir, it shall not be helped against the Devise, but the Devise remains good to the Devisee against the Heir for the whole Land devised, whereby it appeareth, that it was the very purport and intent of the Statute, that the Devise remain as it was at the time of the death of the Devisor, without having regard to that which happeneth Ex post facto, unless for this Point helped by this special Clause of the Statute; and this is for the Lord and his Interest only, and for no other: And by him also clearly the Statute which is an explanatory Law shall never be taken by Equity in the precise Point explained to impugn the Point of Explanation, as here the Statute wills that the Estate of Inheritance comprised in the former Statute, shall be explained to be Fee-simple, it cannot now by any Equity be, as to the Power to make a Devise which is merely given by the Authority of the Statute, said to be of any other Estate than Fee-simple, of which a Devise may be made: And therefore if Land be given to another and his Heirs for the term of another Man's life, a Devise cannot be made of this, because it is not an Inheritance in Fee-simple, but only the Limitation of a Free-hold: And where the Statute saith, having a sole Estate, we cannot by any Equity, that it shall be taken of any joyn Estate, as to make any disposition of that which she had in Joynure, and thereupon the greater part resolv'd that Judgment shall be given against the Plaintiff for the Defendants.

Southwell *versus* Ward.

4. ¶ a second Deliverance between Richard Southwell Esquire, Plaintiff, and Miles Ward Avowant, by Demurrer upon the Avowry, the Case appeared to be this.

That John, Prior of the Church of St. Faiths in Horsham in the County of Norfolk, was seised in his Demesne as of Fee, in the Right of his said Priory, of 8 Messuages, 300 Acres of Land, 30 Acres of Meadow, 60 Acres of Pasture, and 200 Acres of Wood, with their Appurtenances in Horsham aforesaid: And so seised, the said Prior with the Assent of his Covent, by their Deed indented, shewn forth, bearing Date the first day of January, 13 C. 4. and by Licence of the King aforesaid, granted to William then the Master of the Hospital of St. Giles in Norwich, and to the Brothers of the same Hospital, and to their Successors 200 Fagots, and 200 Focalls called Attle-wood, yearly to be taken of all the Lands and Tenements of the said Prior and Covent in Horsham aforesaid, by the Servants of the said Prior and Covent, and their Successors yearly to be carried to the said Hospital, at the Costs and Expences of the said Prior and Covent, and their Successors, at the Feast of St. Michael, or 20 s. of lawful Money for them at the Election of the said Master and Brethren, and their Successors, to take yearly in the same Lands and Tenements in Horsham, to the use of the poor and infirm Persons there being or coming: So that if it happen the said Fagots and Focalls, or the said 20 s. for them to the said Master and Freres in form aforesaid, to be arrear in all or part, &c. then they may distrain in the said Lands and Tenements, and the Distres detain until they be fully satisfied of the said Fagots and Focals, or of the said 20 s. for them as is aforesaid, with this Proviso further, That if at any one or more times, the said Master and Brethren have chosen to have the Fagots and Focals, yet at any other time they make the 20 s. for them, and although they have taken the 20 s. for them once, or oftner, yet at any other time they may take the Fagots and Focals themselves, and that they may so vary *tociies quoties*, and distrain for them accordingly, reasonable notice being given of their Election, in form aforesaid.

And the said Master and Brethren granted by the same Deed to the said Prior and Covent, and their Successors, that they, or others sufficiently warranted by them, would give sufficient notice of their Election yearly, the first Sunday of April in the Church of the said Hospital, to some Officer of the said Prior and Covent, and their Successors, if they send any thither for this cause.

By force of which Grant the said Master and Brethren were seised of the said yearly Rent of the said 200 Fagots and 200 Focals called Ashle-wood accordingly, and so being seised, they by their sufficient Writing enrolled of Record in the Chancery, in the first year of the late King E. 6. gave and granted to the same King the said Hospital, and all the Lands and Tenements and Hereditaments of the said Hospital; To have and to hold, to him and his Heirs and Successors for ever, whereby the said King was thereof, and of the said Annual Rent seised accordingly, and so seised the 7th day of May, in the same year, the said King E. by his Letters Patents, bearing date the same day and year, granted the said Hospital and the Rent of the said Fagots and Focals, and other the Premises, to the Mayor, Sheriff, Citizens and Commons of the City of Norwich, and to their Successors for ever; and for 1600 Fagots and 1600 Focals of the said Annual Rent of 200 Fagots and 200 Focals, being arrear at the Feast of S. Michael the Archangel, 23 Eliz. the said Ward took the Distress, and made Conulsance as Bailiff to the said Mayor, Sheriff, &c. And it was moved that the Abowry was not good, first, because it being matter of Election which was granted to the Master and Brethren, and their Successors, to wit, the Fuel, or the 20 s. it doth not appear that they ever made any Election of the one, or the other, and until it appeareth that they have made their Election to have the one or the other, it is not to be granted over by general words: But by the Dissolution of the Hospital, the Grant, for want of Election before is gone and determined.

And further, whereas the King made his Grant of the Hospital, and of all the said Rent of Fagots and Focals, without making mention of 20 s. for the same, it was moved that if it doth pass to the King, yet it doth not pass from him to the Mayor, &c. in as much as he granted it precisely as a Fuel, whereas it was in him as a Rent of Fuel, or of Money at his Election, and therefore the King deceived in his Grant.

And further, here he hath made Conulsance for the Fuel without making mention of their Election, to have it one way, or another, before the taking; but all the Court agreed that the Conulsance was good, and that the Reward shall be awarded to him who made the Conulsance: first, because that this Case is quite out of the Case of Election, because the Rent which is granted is only out of the Fagots and Ashle-wood, and the 20 s. granted is not as a distinct thing, but granted as a Recompence or satisfaction of that, because the Grant is of the Fagots, &c. or of 20 s. for the same; so that in such a Case the Heilin of the 20 s. is a good Heilin of the Fagots and Focals, and sufficeth to maintain an Assise upon this Heilin for the Fuel, but not for the 20 s. as Money paid for Suit of Court is good Heilin of the Suit: And the 20 s. here is not granted in nature of a Rent of so much, but as an Allowance in satisfaction for the Fuel.

And Popham conceived that he shall have an Action of Debt for this 20 s. for the Fuel, after the Election made, if he will, as for a Nomine poene, because it is not the principal thing granted of which the Inheritance is, but a casual Accident in recompence thereof if he will have it, or otherwise he may constrain for it, because it is so limited to be done by the Grant it self: But they shall never have assurance of the 20 s. as a thing of Inheritance, because it is not the thing of which the Inheritance is granted, but only granted in allowance and satisfaction of it, and therefore not to be resembled to the Cases where 20 Quarters of Corn, or 20 s. Rent is granted to one

one and his Heirs, or other such thing which stands mearly in the Disjunctive, to wit, to have, or take the one or the other.

And therefore suppose the Prior was to carry the Fuel yearly to the Hospital at the Feast of S. Michael, and yet then the Master and Brethren might have refused the Fuel, and held themselves to have the 20s. by force of the Grant, for then Originally the Election ought to have been made there: But upon the Covenant which cometh afterwards on the other part, the notice ought to have been given in April yearly before, but if it be not done, there lies but an Action of Covenant for the not doing of it, for this will not alter the nature of the Grant which was full and perfect in Law before. And here he needs not make this appearance in the Consulance, that any Election was made before the taking of the Cartel, because the Grant is of the Fuel it self, and if the other had made Election before to have the 20s. for the Fuel, this ought to have been shewn on the other side in Bar of the Aowry, to wit, that he brought to them the Fuel yearly according to the Grant, and that they refused it, and required the 20s. every time for it, in which Case for every such Refusal and Election to have the 20s. for it, it had excluded him to have any Fuel for this year so refused.

And by Popham also, you may see a great diversity between this Case, where a Man is to deliver to another 20 Loads of Wood, or 20 Loads of Hay yearly out of such Land, and he does not tender them for divers years, and where a Man is to take so much Fuel, or Hay out of the Land of another, and he takes it not for divers years, for in the former Case the Party who is not satisfied shall have all the Arrears, be it never so prejudicial to the Grantor, because it was through his own default that it was not paid, but in the other Case as appeareth, 27 H. 6. 10. he shall not have any Remedy for the Arrears for the years past, because he took them not yearly as they were due, which shall not turn the other Party to prejudice, that he shall want Fuel, or Hay himself, by reason of the Arrears which happened through the default of him who ought to take it, and the Judgment was given for him who made the Consulance, and it is entered in the King's Bench, Mich. 33 & 34 Eliz. Rot. 229.

Southwell's Case.

5. **A**t the end of this Term, upon the proceeding against Southwell the Jesuit, it was moved by the Attorney-general to Popham Chief Justice, the Master of the Rolls, Periam Chief Baron, Walsley and Owen Justices, and Ewens one of the Barons of the Exchequer upon the form of Indictments, upon the Statute of 27 Eliz. for Jesuits, &c. If it need be comprehended in the Indictment of a Jesuit, who cometh into the Realm of England, or any Dominions of the Queen, or shall be taken therein 40 days after the end of this Session of Parliament, that if he doth not submit himself within thre^e days of his landing, if he cometh in after the 40 days according to the Proviso of the Statute, or that he was not so infirm of his Body (where he came in before the 40 days) that he was not able to pass out of the Realm by the time prescribed at first, because that it is comprised in the Body of the Act, that it shall not be lawful for any Jesuit, &c. being born within this Realm, or any other the Queen's Dominions, and made after the Feast of S. John Baptist, in the first year of her Reign, or after this to be made by any Authority derived, &c. from the See of Rome to come, be, or remain in any part of this Realm, &c. otherwise than in such special Cases, and upon such special occasions, and for such time only which is expressed in this Act, and if he does, that this Offence shall be adjudged High Treason, &c.

And

And after Deliberation taken, and Consideration and Conference eamongst themselves had, they all resolved that the better course was to omit this in the Indictment, notwithstanding it be comprised in the Body of the Act in the same manner as if it had been only in a Proviso; in which Case it is to the Prisoner to help him by means of such a Proviso, if he can do it: for the words (other than, &c.) are but as referring to the Provision subsequent in the Statute, in which Case this matter shall be used but as the Proviso it self shall be; and according to this it hath been commonly put in practice by all the Justices in all places after the Statute until now.

And they agreed also, that it need not be shewn whether he were made a Jesuit, or Priest, &c. either beyond Sea, or within the Realm, because where soever it was, it is within the Law if he were made by the pretended Authority of the See of Rome.

But they agreed that it ought to be comprised in the Indictment that he was born within this Realm, or other Dominions of the Queen, but need not to shew where, but generally, Et quod I. H. natus infra hoc Regnum Angliae, &c. And the Indictment ought to comprise that he was a Jesuit, or Priest, &c. by Authority challenged or pretended from the See of Rome, because that this is in the Body of the Act, without such Reference as in the other Point, and according to this Resolution the Proceeding was against the said Southwell.

Easter Term, 37 Eliz.

Pigot's Case.

1. **A**fter the death of Valentine Pigot Esquire, a Commission was awarded in nature of a Mandamus, and after the death of Thomas Pigot Father of the said Valentine, a Commission was awarded in nature of a Diem clausit extremum, and the said Commissions were awarded to one and the same Commissioners, who by one Inquest took but one Inquisition upon these several Commissions in this Form.

Inquisitio indentata capta apud, &c. virtute Commiss. in natura brevis de Diem clausit extremum eisdem Commiss. direct. &c. ad inquirendum post mortem Thomae Pigot, Ar. nuper defuncti patris predict. Valentini. per sacramentum, &c. Qui dicunt, &c. After which all the Points of the Commission after the death of the said Valentine are enquired of; but for the Commissions after the death of the said Thomas Pigot, it is imperfect in some Points, as who is his Heir, &c. is not found.

And by Popham and Anderson, this Inquisition is void as to Valentine as well as for Thomas, for their Authorities which are the Commissions are by several Warrants which cannot be simul & semel by one and the same Inquisition executed and satisfied, but ought to be divided and several, as the Warrant is several, and yet the same Inquest which found one Inquisition by one Warrant, may also find another Inquisition by another Warrant, but divided and several, and not as one, for as it is made it does not appear upon which of the Commissions the Inquisition as to Valentine is taken, for as it is made it may be as well upon the one as upon the other, for it is said to be by virtue of both the Commissions, which cannot be, and therefore is not good in any part, and several Warrants ought to be severally executed, and therefore although the Escheator, as appeareth by 9 H. 7. 8. may take an Inquisition Virtue officii, and at the same day another Inquisition Virtue brevis by one and the same Inquest, yet this cannot be drawn into one Inquisition:

Aud

And that which is found Virtute officii contrary to that which before the same day Virtute brevis, as that it found more Land, is good for the King. And this their Opinion was certified to the Court of Wards.

sir Rowland Hayward's Case.

2. **T**his Case was also sent to the same Chief Justices out of the Court of Wards: Sir Rowland Hayward being seised in his Demesn as of in Coke 2. Rec. 2, of the Mannors of D. and A. in the County of Salop, and of other Lands part 35. in the same County, part whereof were in Lease for ye. rs by several Indentures, rendering certain Rent, part in the Possessions of several Copy-holders, and part in Demesn in Possession out of Lease, by Indenture dated 2 September, 34 Eliz. made mention that this was so, and in consideration of a certain sum of Money to him paid by Richard Warren Esquire, and others, devised, granted, bargained and sold to the said Richard Warren and the others, the said Mannors, Lands and Tenements, and the Reversion and Remainder of them, and of every part of them, and the Rents and Profits reserved upon any Demise thereupon for 17 years, next ensuing the death of the said Sir Rowland, rendering a Rose at the Feast of St. John Baptist yearly, if it be demanded, which Deed was acknowledged to be enrolled, and afterwards by another Indenture covenanted and granted for him and his Heirs, hereafter to stand seised of the said Mannors, Lands and Tenements, to the use of the said Sir Rowland, and of the Heirs Males of his Body, and afterwards and before any Attornment to the said Richard Warren and his Co-lessees, or any of them, the said Sir Rowland died seised of the said Mannors, Lands and Tenements, leaving a full third part of other Lands to descend to his Heir.

And it was moved on the Queen's part, that for part, to wit, for that which was in Possession it past to the said Richard Warren, and the other by way of Demise at Common Law, and therefore it doth not pass afterwards by way of Bargain and Sale as to the Remainder, and that therefore for the Services of the Mannors, and for the Rents reserved upon the Demise, these remain to the Heir who was in Ward to the Queen, and within Age, and therefore to the Queen by reason of the Tenure which was in Capite by Knights Service.

But by Popham and Anderson it is at the Election of the said Richard Warren and his Co-lessees to take it by way of Demise, or by way of Bargain and Sale, until that by some Act done, or other matter, it may appear that their intent is to take it another way, for the Use in this Case may well pass without the Inrolment of the Deed, because the Statute of 27 H. 8. of Informations extends but to where a Free-hold is to pass, and the Use so passing, this shall be executed by the Statute of 27 H. 8. of Uses, and therefore if the said Richard Warren and his Co-lessees after the death of the said Sir Rowland Hayward, would elect to take it by way of Bargain and Sale, they shall have all the Reversions, Remainders, Rents and Services, as well as the Land in Possession executed to them by the Statute of Uses: And of the same Opinion were all the Justices in Trinity Term following, upon their meeting at Serjeants Inn for another great cause,

Trinity Term, 37 Eliz.

Where a Justice is not bailable, he shall be fined, and albeit he be committed but for Suspition of Felony, and hath no notice of his Offence.

Upon an Assembly of all the Justices and Barons of the Exchequer at Serjeants Inn in Fleet-street, this Term it was resolved by them, and so agreed to be hereafter put in Execution in all Circuits; That if a Man taken for Felony be examined by a Justice of Peace, it appeareth that the Felon is not Bailable by the Law, and yet the Justices commit him to Goal but as upon Suspition of Felony, not making mention for any Cause for which he is not Bailable, whereby he is brought before another Justice of Peace, not knowing of any matter why he ought not to be bailed, whereupon they bail him, these Justices ought to be fined by the Statute of 1 & 2 Phil. & Mar. for they offend if they bail him, who by the Statute of Westm. 1. is not Bailable, and therefore they at their peril ought so to inform themselves before the Bail taken of the matter, that they may be well satisfied that such an one is Bailable by Law; and therefore observe well the Statute of Westm. 1. cap. 18. who is Bailable, and who not by the Law. And it seems that no Justice of Peace could have bailed any one for Felony before the Statute of 1 Rich. 3. cap. 3. which is made void by 3 H. 7. cap. 3. for before this he ought to have been bailed by the Sheriff, or other Keeper of the Prison where he was in Ward, or by the Constable, and by no other Officer, unless Justices of the King's Bench, Justices in Eyre, or Justices of Goal-delivery.

Herbin *versus* Chard, and others.

2. **I**n Trespass by William Herbin Plaintiff, against Chard and others Defendants, for a Trespass made at Pynon Farm in Netherbury and Loder, in the County of Dorset, the Case upon the Demurrer appeared to be this.

The Lord Poerant was seised of the Farm, in his Demesn as of Fee, and so seised, demised it to Philip Fernam, Elizabeth his Wife, and John Fernam the eldest Son of the said Philip, for term of their lives, and of the Survivor of them, and the said Elizabeth died, after which the said Philip his Father demised his part of the Farm by his Deed indented, dated 13 Mart. 32 Eliz. to Philip his Son, and Toby Fernam his Son, for eighty years, immediately after the death of the said Philip the Father, if the said John Fernam shall so long live, with divers Remainders over for years, depending upon the life of the said John, after which the said Philip the Father died, and John survived him, and demised the said Farm to the Plaintiff, upon whom the Defendants entered in Right of the said Philip and Toby, and whether their Entry were congeable, was the Question: And it was moved by Goodridge of the Middle Temple, that the Entry of the Defendant was not lawful, because the said John was now in by the Lessor, and not by his joyn Companion.

And further, he had no power to dispose thereof beyond his own life; for suppose that he makes a Lease thereof for years, and afterwards grant over his Estate to a Stranger, and dies, the Lease for years is thereby determined, albeit his joyn Companion be yet living, and that his Estate continues.

And yet he agreed, that if he had made a Lease for years, to begin at a day to come, as at Michaelmas following, or the like, that this had been good, for it is an Interest in the Grantees to be granted over for the Presumption, that it might be executed in his life; but in the other Case there is not any possibility, that he who hath not but for his life, can demise it to begin after the Estate made to him is determined.

But on the other part, it was moved that the Demise remains in force for the life of the said John, for at the first every one had an Interest for the life of the other also, and therefore if one joint-tenant for life make a Lease for years in Possession, and dies, the Lease yet continues.

And Crook the younger alledged, that it was adjudged at last Harts Term, If a Man possessed of a Term for years in Right of his Wife, makes a Lease for years of the same Lands to begin after his death, and dies during the Term, without other alteration of it, and the Wife survives him, that now the Lease made by the Husband is good, and that the like Case as this, by the Opinion of Clench and Walmley was decreed to be good in the Chancery.

Arton *versus* Hare.

3. **I**n a second Deliverance between Francis Arton Plaintiff, and Henry Hare Avowant, the Case appeared to be this.

William Cockley Esquire was seised in his Demesne as of Fee, of the Mannor of Wolverton in the County of Worcester, and so seised in Octab. Mich. 7 C-
liz. levied a Fine of the said Mannor to certain Persons, to the use of the said William and Alice his Wife, and the Heirs of William, until a Marriage had between Martin Croft and Anne Wigstone, and after this Marriage to the use of the said William and Alice his Wife, and the Heirs of the Body of the said William, and for default of such Issue, to the use of the said Martin Crofts and Anne, and the Heirs Males of the Body of the said Martin upon the Body of the said Anne begotten, until the said Martin should go about to alien, sell, grant, or give the said Mannor, or any parcel thereof, or to suffer any Recovery, or levy any Fine thereof, or make any Discontinuance, &c. And after the Estate of the said Martin and Anne, and of the Heirs Males of their Bodies to the Premisses, by any such Attempts determined and finished, then to the use of the said Anne for her life, and after to the use of the Heirs Males of the Body of the said Martin upon the Body of the said Anne lawfully begotten, and for default of such Issue to the use of the Heirs of the Body of the said Martin, and for default of such Issue, to the use of Giles Croft, Brother of the said Martin, and the Heirs Males of his Body, until, &c. as before, and after to the use of the Heirs of the Body of the said Giles, and for default of such Issue, to the use of Edmund Crofts, the third Brother of the said Martin, and of the Heirs Males of his Body, as is before limited to the said Giles, with Remainders over, afterwards the Marriage was had between the said Martin and Alice, after which the said Martin and Giles died without Issue, without any thing done by the said Martin to determine his Estate, or by the said Giles to determine his Estate, if any had been.

And it was agreed by all the Court, that as this Case is, no Remainder can enure over to the said Giles, without an Attempt precedent by the said Martin to determine his Estate, because the Estate of Giles is not limited to begin but upon such an Attempt precedent.

And in the same manner Edmund shall have nothing until the Estate of Giles determine by some Attempt made by him, if the said Giles had an Estate, because the Estate of Edmund depends upon the Attempt made by Giles precedent to it, which not being done, the Estate of Edmund never happened to be; and therefore he who cometh in under a Discontinuance made by the said William Cockley, after the death of Martin and Giles without Issue notwithstanding the Remitter of the said Alice in the Case, is to have the Land against those who come in by the said Edmund, and upon this Point only Judgment was given accordingly in the King's Bench.

Grenningham *versus* the Executors of Heydon.

4. **I**n a Debt upon an Obligation of 200 Marks by Richard Grenningham Plaintiff, against the Executors of one Ralph Heydon Defendants, the Case appeared to be thus upon Demurrer.

The said Heydon was bound to the Plaintiff in 200 Marks, the Condition whereof recites, that whereas the said Heydon had received of the said Grenningham 70 l. 6 s. 8 d. before the date of the said Obligation of 200 Marks in payment and satisfaction of certain Obligations and Bills of Debt, remaining in the hands of the said Heydon, and specified in the Condition what they were in certain, and the which said Bills and Obligations the said Heydon is to deliver, or cause to be delivered to the said Grenningham, his Heirs or Assigns, before the Feast of S. Michael, next ensuing the date of the said Obligation, or otherwise the said Heydon, his Executors, Administrators or Assigns, or some of them before the same Feast, shall make, or cause to be made and delivered to the said Plaintiff, his Heirs and Assigns, such good and sufficient Acquittances for the payment of the said sums of Money formerly mentioned, as the said Plaintiff, his Heirs, Executors or Assigns shall devise, or cause to be devised by the Council of the said Plaintiff, his Heirs or Assigns, before the Feast, without fraud or deceit, that then the said Obligation shall be void, &c.

And before the Feast the said Plaintiff did not devise any Acquittance; Whether now the Obligation be saved by the Disjunctive, without delivering the Obligations and Bills before named, before the Feast of S. Michael: Rot. 36. & 37.

Eton and Monney *versus* Laughter.

See this Case
Coke lib. 5. 21.
of Laughter's
Case.

5. **I**n a Debt upon an Obligation of 400 l. by Thomas Eton and Roger Monney Plaintiffs, against Thomas Laughter Defendant, who was bound by the name together with one Richard Rainford to the said Plaintiffs, the Condition of which Obligation was,

That if the said Richard Rainford after Marriage had between him and Jane Gilman Widow, together with the said Jane, alienate in Fee, or Fee-tail all that great Messuage of the said Jane in London, in the Tenure of William Fitz Williams Esquire, if then the said Richard Rainford in his life time purchase to the said Jane, her Heirs and Assigns, Lands and Tenements of good Right and Title, and of as good value as the Money raised upon the Alienation of the said Messuage amounts unto, or leave to the said Jane after his decease, as Executrix, or by Legacy, or other good Assurance, so much Money as he shall receive or have upon the said Sale, that then the Obligation shall be void: After which the said Richard Rainford married with the said Jane, and the said Richard and Jane sold the said Messuage in Fee by Fine, for 320 l. received by the said Richard Rainford, after which the said Jane died, no Lands being purchased to the said Jane by the said Richard, and the said Richard yet living.

Michaelmas Term, 37 & 38 Eliz.

Sawyer *versus* Hardy.

1. **I**n an Ejectione firmæ, by Christopher Sawyer Plaintiff, against Edmund Hardy Defendant, for a Messuage in S. Martins; upon a Demurrer, the Case was this.

A Lease was made of the said Messuage to one Margaret Sawyer for 40 years, upon Condition, that if the said Margaret should so long continue a Widow, she should dwell and stay in the same Messuage, the said Margaret continued a Widow, and dwelt in the same House all her life, and died during the said Term of 40 years, making the Plaintiff her Executor, and by Award the Plaintiff had Judgment to recover: For by Popham, Gawdy and Clench, this now was no Condition nor Limitation, for it hath no certain Conclusion upon the (that if) to wit, that then the Term shall continue, or that she shall pay so much, or otherwise what the Conclusion shall be, none can imagine: As if such a Lease be made upon condition, that if the Lessee does such a thing without other Conclusion, it is a good Lease for 40 years, for none can imagine what the Conclusion shall be in such a Case, or that then the Lease shall be void, or that he shall re-enter, or that the Lessee shall forfeit so much, or what shall happen upon it, for which Incertainty it shall be taken as a void Clause.

But by Popham, if it had been Sub conditione si tamdiu vixerit, it had been good to determine the Lease, but it is otherwise of the word (quod si) for the Incertainty as before.

And they all agreed, that if the Lease had been for 40 years, Si tamdiu sola viveret & inhabitaret in eodem Messuagio, that the Lease had been determined by her Marriage, or death. In the same manner, as if it had been Si tamdiu vixerit. And so in truth had been the Case if it had been well pleaded, but by pleading the advantage thereof was lost, and the truth not disclosed.

But by Popham, If a Lease be made for 40 years, if he shall dwell in the same for his life, there it is good for 40 years, upon performance of the Condition, the diversity appeareth, to wit, where it is, if he shall dwell there during the Term, and where it is, if he shall inhabit there during his life.

Goodale *versus* Wyat.

2. **I**n an Ejectione firmæ by Cuthbert Goodale Plaintiff, against John Wyat Defendant, for a Meadow in Aylesbury, in the County of Buck. called Diggelmore, upon a special Verdict the Case was this.

Sir John Packington Knight, enfeoffed thereof one Ralph Woodliff, to have and to hold to him and his Heirs, upon condition that if the said Sir John within a year after the death of the said Ralph, pay to the Heirs, Executors or Administrators of the said Ralph, the sum of an hundred Marks of lawful Money, that then the Feoffment and Seisin made thereupon shall be void, Ralph Woodliff made a Feoffment over to others thereof, and died intestate, and Administration was committed to Anne his Wife, and Drew Woodliff his Son and Heir, who gave a Warrant of Attorney to Thomas Goodale then seised of the said Meadow by mean Conveyances, for the Receipt of the said hundred Marks, with Covenant that none of them shall do any act or thing that shall be prejudicial or hurtful to the said Thomas Goodale, for the receiving and enjoying of the said sum, after which it was certified to the said Sir John Packington by the said Goodale

See this Case
Coke lib. 5. fol.
95, 96. by the
name of Good-
ale's Case.

that this Warrant was made to him: after which it was agreed between the said Sir John Packington and Drew Woodliff, that the said Thomas Drew shall have but 32 l. of the said 100 Marks, whereupon the said Sir John Packington within a year after the death of the said Ralph Woodliff paid to the said Drew Woodliff the 100 Marks, and presently the said Drew delivered to the said Sir John all the 100 Marks but 32 l. And the Verdict stands upon this Point, whether the 100 Marks were well paid, or not.

And by Popham and Gawdy, this was merely a Fraud which shall never prejudice a third Person, for if it be agreed between the disseisee and I. S. that a Stranger shall disseise the Tenant of the Land, and enfeoff the said I. S. to the intent that the disseisee shall recover against him, this Recovery shall bind the said I. S. but not him who was disseised, and yet he who recovered had a good Title, and paramount the other, but he shall not come to that to which he had a good cause of Action and Title by fraudulent means, to the prejudice of a third Person, not Party to this Fraud.

And it was said further, that to pay Money, and take it away again presently before that it is pursued up by Re-delivery, is not properly a Payment, but rather a colour of Payment.

And by Fennor and Popham, the force of a Deed of Feoffment once effectual, cannot become void or of no effect, nor the Liberty thereupon by such manner of words. And it is not like a Bargain of Goods, or an Obligation, or a Lease for years, which by such words may be dissolved and made to be of no force or effect, because that as by the sealing a bare Contract, it may be made perfect and effectual without other Circumstances, so may it be defeated by such bare means without Circumstance: But so it is not in case of an Inheritance or Free-hold, which cannot be effectual by the bare delivery of a Deed, unless that Liberty be made thereupon.

And all agreed, that as this Case is, notwithstanding the Feoffment made over by the Father, the Money might have been paid to the Heir to perform the Condition, if they had been duly paid, and without Covin, and that the words had been apt to have defeated the Estate.

In which Case a Condition shall be performed to the Assignee, and not to the Heir.
But by Popham and Clench, If a Feoffment be made to one upon condition of Payment of Money to the Feoffee, his Heirs or Assigns, and the Feoffee makes a Feoffment over, and dies, the Money ought to be paid to the Feoffee who is the Assignee, and not to the Heir, for there (Heir) is not named but in respect of the Inheritance which might be in him, but here he is named as a mere Stranger to it.

Barton's Case.

3. **I**n a Writ of Error sued in the King's Bench by Randal Barton, upon a Fine levied at Lancaster, 7 Eliz. of Land in Smithall, and elsewhere in the County of Lancaster, by Robert Barton Esquire, to Leven and Browndo, where this Writ was brought by the said Randal as Heir in full to the said Robert, to wit, Son of Ralph, Brother of the said Robert. The Defendant plead a Recovery in Bar thereof had after the Fine, in which the said Robert was vouched, who vouched over the common Vouchee: And by all the Court this common Recovery with such double Voucher (which is the common Assurance of Lands) is a Bar by reason of the Voucher, to every manner of Right which the Vouchee, or his Heir by means of him is to have to this Land, which is paramount the Recovery. And so it is of every manner of way whereby they are otherwise to come to the Land before the Recovery. And if the Recovery be erroneous, it remains a good Bar until it be avoided by Error. But if the Recovery be void, or the Voucher not warranted to be

be, pursuing the Appearance of the Tenant, but precedent to it, as was pretended, and so no Tenant to warrant the Woucher when the Woucher was made, the Recovery shall be no Bar in such a Case; and the Case here was informed to be this, for the Writ of Entry bears date 1 Mar. 7 Eliz. returnable Die Luna in 4. Septimana quadragessima prox. futur. and the Woucher was made in 4. Septimana quadragessima, 7 Eliz. the said first day of March, being the first Week of this Lent, 7 Eliz. And upon this it was inferred that the Tenant was not to appear until Monday in the fourth Week of Lent, 8 Eliz. which is a long time after that the Woucher appealed and bouched over.

But by the whole Court the Original Writ shall be taken as it is written, to be returnable on Monday, in the fourth Week of the same Lent, 7 Eliz. for it shall be taken as it is written shortly, most beneficially that it can be to make the Recovery good. And if it had been written Proxime, it should refer to the week before, and so good. And if the word (Futur.) had been written at large (Futura) it also shall refer to Septimana, and therefore being written briefly it shall refer as it may best do to make the Recovery good. But if it had been in Quarta septimata proxima quadragessima at large, then the word Proxima shall refer to Quadragessima because of the Case: But if it had been Proxima it shall refer to Septimana, because also of the Case; But here as the Case is, it shall be a good Reference to make the words Tunc proxima futur. to shew what fourth week of Lent, to wit, that next ensuing the first day of March. As if a Man be bound by Obligation, bearing date the first day of March, to pay the 10th day of March then next ensuing, this shall be taken the 10th day of this March, because this is next ensuing the first day.

Paramor *versus* Verald.

4. **I**n Trespass of Assault and false Imprisonment, by Robert Paramor against John Verald, and others, supposed to be done at such a Parish and Ward in London, the 20th day of May, 35 Eliz. The Defendants justify by reason of an Execution upon a Recovery in the Court of Sandwich, within the Cinque Ports, Debt, and traverse Absque hoc, in that they were guilty in London, &c. The Plaintiff reply and maintain the Assault and Imprisonment, as it is said, and traverses Absque hoc quod habetur aliquod tale Recordum loquelle prout, the Defendants have alledged, Et hoc paratus est verificare per Recordum illud, And upon this the Defendants demurred in Judgment: And per Curiam the Defendants Plea Prima facie was good, because it was a special manner of Justification, which cannot be pleaded and alledged to be in any other place than where it was done, in the same manner as if they had justified by force of a Capias directed to the Sheriff of another County, than where the occasion brought, or by Warrant of a Justice of Peace of another County, for matter of the Peace, and the like, which are not like to the Case of Partridge, who was beaten in the County of Gloucester by Sir Henry Pole, for which he brought an Action in London: And Sir Henry Pole would have justified by Assault of the Plaintiff in the County of Gloucester, with a Traverse that he was not guilty in London: But it was then ruled in this Court, that he could not do it to oust the Plaintiff to sue in London, but in such a Case he might have alledged that the Assault was done in London, because it was also a thing transitory, of which they shall take notice there, and so help himself if the matter had been true.

But in the Case at the Bar, if the special matter alledged in the Foreign County be false, as here, the Plaintiff may maintain his Action and traverse the special Matter alledged by the Defendant: And so a Traverse in such a Case may be upon a Traverse when Falsity is used, to oust the Plaintiff of that benefit which the Law gives him.

Hillary

*Hillary Term, 38 Eliz.*Wood *versus* Matthews.

1. **I**n a Writ of Error brought by Owen Wood, against Griffeth Matthews, upon a Judgment given in the Common Pleas, the Case was briefly thus.

The Issue in the Common Pleas was, whether one were taken by a Cap ad satisfaciendum, or not, and upon the Trial thereof at the Nisi prius, the Jury found for the Plaintiff in this Action, *to wit*, that the Party was not taken by the said Capias, and upon the back of the Pannel entred *Dicunt pro Quer.* but on the back of the Postea the Clerk of the Assizes certified the Pannel thus, *to wit*, That the Jury say, that no Capias was awarded, which was otherwise than was put in Issue, or found by the Jury; and the Roll of the Record was according to the Postea, and upon this Judgment given for the said Matthew then Plaintiff, upon which (amongst other Errors) this variance between the Issue and Verdict was assigned for Error, and after Deliberation had upon this Point, and this matter alledged by the Defendant in the Writ of Error, and certified out of the Common Pleas, the Court awarded as to this Point that the Record sent up out of the Common Pleas by the Writ of Error, shall be amended, according to that which was endorsed on the back of the Pannel, for the Endorsement upon the Pannel is the Warrant for the certifying of the Postea, and so this Warrant over to him that makes the Entry in the Roll: And therefore whereas it was alledged that the Postea was amended in the Common Pleas after the Record removed, it was holden to be well done there; for although the Record were removed by the Writ of Error, yet the Nisi prius, the Postea, and the like remain still there, as it is of the Warrant of Attorney, and the like: And if the Postea had not been amended there, but sent up with that which was endorsed upon the Pannel, all shall be amended here according to that which was endorsed upon the Pannel, and according to this there was a President shewn Trin. 35 H.8. between Whitfeld and Wright, where the Issue was, whether a quantity of Grain were delivered between two Feasts, and endorsed upon the Pannel (*Dicunt pro quer.*) and yet the Postea certified (and the Rolls also made) that the Delivery was made ad festa, and upon this matter alledged in Banco Regis, and the Error in this Point assigned and certified out of the Common Pleas, the Record removed by the Writ of Error was by Award of the Court amended, and the word (Ad) razed out, and the word (Inter) written in lieu of it, according as it appeareth it ought to have been by the Note upon the back of the Pannel. And the like Amendment was made lately in the Chequer Chamber, upon Error brought there upon a Judgment given in Banco Regis, where the Indorsment upon the back of the Writ was (*pro Quer.*) and the Postea and Roll was, that the Plaintiff was guilty, and there amended the last Term.

Slaning's *Cafe.*

Nicholas Slaning of Bickley was seised in his Demesne as of Fé, of the Manors of Bickley, and of a Mill in Walkhampton, in the County of Devon, called a Blowing Mill: and of another Mill there, called a Knocking Mill, and of an Acre of Land there also, and of divers other Manors and Lands in the said County of Devon, the said Mills and Acres of Land in Walkhampton, then being in the Possession of one Petersfeld, and Atwill, of an

an Estate for divers years then to come, and being so seised, he with Margaret his Wife levied a Fine of the said Mannors of Bickley, and of other Lands, omitting the said Lands in Walkhampton, to certain Trouzers, who rendred the same back again to the said Margaret Slaning for her life, with the Remainder over to the said Nicholas and his Heirs : After which the said Nicholas by Indenture dated 30 Octob. 21 Eliz. gave and enfeoffed all the said Mannors and Premises to John Fitz and others, and the Heirs of the said Fitz, to the uses, Provisoes and Limitations mentioned in the said Indenture, which was to the use of himself, and the Heirs Palms of his Body, by any other wife, the Remainder to Nicholas Slaning of Newton Ferries, and the Heirs Palms of his Body, with divers Remainders over, with this Proviso, to wit, Provided, and it is the intent of these Presents, and of the Parties thereunto, that the said John Slaning, and the Heirs Palms of his Body, or the said Nicholas Slaning of Newton Ferries, and the Heirs Palms of his Body, in whomsoever of them the Inheritance in Tail of all the Premises shall happen to be by force of these Presents, shall pay to Agnes, the Daughter of the said Nicholas Slaning of Bickley, 200 l. or so much thereof as shall be unpaid at the time of the death of her said Father, according to the intent of his last Will, with a Letter of Attorney to it, by which he ordains John Hart and Robert Fort, joynly and severally his Attorney to enter into the said Mannor of Bickley, Walkhampton, &c. and all other the Lands, Tenements and Hereditaments, in the said Indenture mentioned, and Possession for him to take, and after such Possession taken for him and in his name, to deliver full Possession and Seisin of the Premises to the said John Fitz, &c. according to the form and effect of the said Indenture, whereupon Possession and Seisin was given of all but that which was in Possession of the said Peterfield and Atwill : And the said Peterfield and Atwill, nor either of them never attorned to the said Grant : After which Nicholas Slaning of Bickley made his last Will, by which he devised to the said Agnes his Daughter 200 l. to be paid in form following, and not otherwise, to wit, an 100 l. thereof, in these words, On that day twelve-month next after the day of his death, and the other 100 l. that day twelve-month next after, &c. and made the said John Slaning his Executor, and after wards, to wit, the 8th day of April, 25 Eliz. died without Issue Palm of his Body, the said Agnes took to Husband one Edmund Marley, and upon the 8th day of April, 26 Eliz. the said John Slaning paid the first 100 l. to Agnes then being living, and upon the 8th and 9th days of April, 27 Eliz. Nicholas Slaning of Plumpton, Son and Heir of the said John Slaning, who died (in the mean time) an hour before the Sun set, and until the Sun was set, came to the House where the said Edmund and his Wife inhabited in London, and tendred the last 100 l. and that neither the said Edmund nor Agnes his Wife were there to receive it, but that the said Edmund voluntarily absented himself, because he would not receive the 100 l. and that thereupon the Wife of the said Edmund died, having Issue two Daughters, the Lands being holden by Knights Service in Capite, and the said Daughters being yet within Age, and all this being found by Office, by the Opinions and Resolutions of Popham and Anderson, and the rest of the Council of the Court of Wards, the said Heirs now in Ward shall have nothing but that which doth not pass by the Conveyance to John Fitz and his joynl Feoffees, which was only that which was in the Possessions of Peterfield and Atwill, and that the Livery was good of the rest, albeit the Attorney did nothing of that which was in Lease, notwithstanding the words of the Warrant, that they should enter into all, and then should make the Livery.

And they agreed, that the Condition doth not bind neither the said John Slaning nor Nicholas his Son, because they had not all the Land according to the purport of the Condition, which was, that he who had all thereof should pay

pay the 200 l. whereas here that which was in the Possession of Peterfield and Atwill did not pass to them for want of Attornement, for a Condition ought to be taken strictly.

And further the Payment was referred by the Indenture to be according to the Will, or by the Will, and the 200 l. was devised as a Legacy, which ought to be paid upon Demand, and not at the peril of the Executor, and therefore the nature of the payment of it is altered by the intent of the Will, and being not demanded, there is no default in the said Nicholas Slaney of Plumpton, to prejudice him of his Land, if it had been a Condition, for then it shall be but a Condition to be paid according to the nature of a Legacy upon demand, and not at the peril of the Party. And whether the word twelve-month shall be taken for a year, or twelve months, according to 28 days to the month, as it shall be of eight or twelve Months, or the like. And they agreed that in this Case it shall be taken for the whole year, according to the common and usual speech amongst Men in such a Case, and according to this Opinion Wray (who is dead.)

Anderson and Gaudy made their Certificate to the late Chancellor, Sir Christopher Hatton, in the same Case then being in the Chancery, and a Decree was made accordingly.

And many were of Opinion that by his absence, by such fraud he shall not take advantage of the Condition, being a thing done on purpose, if it had been to be performed at his peril.

Kelley's Case.

William Kelly and Thomasine his Wife, were seised of certain Lands in S. Eth. in the County of Cornwall, called Karkian, to them and to the Heirs of their two Bodies between them lawfully begotten, by the Gift of one William Dowmand Father of the said Thomasine, 11 H. 8. a long time after which Gift, to wit, 25 H. 8. A Fine Sur conuance de droit come ceo que il ad per, was levied by Peter Dowmand, Son and Heir of the said William Dowmand to William Kelley of the Manoy of Dowmand, and of an 100 Acres of Land, 300 Acres of Meadow, 300 Acres of Pasture, and a 1000 Acres of Furze and Heath in Dowmand, S. Eth. Trevile, and divers other Towns named in the Fine, who rendred the same back again to the said Peter in Tail, with divers Remainders over, and this Fine was with Proclamations according to the Statute, after which the Possession of Karkian continued with Kelley and his Heirs, according to the first Intail; and the Manoy of Dowmand, and the Remainder of the Lands in these Towns, which were to the said Peter Dowmand to him and his Heirs according to the Bunder, until nine years past, that by Nisi prius in the Country upon the Opinion of Manwood late Chief Baron, the Land, called Karkian, was recovered against the Heir of the said William Kelly, by virtue of the said Fine and Bunder, because all the Land which the said Peter Dowmand, and the said William Kelly also had in all these Towns named in the Fine, were not sufficient to supply the Contents of Acres comprised in the said Fine: And what the Law was in this Case, was referred to the Chief Justices, the Master of the Rolls, Egerton, and the now Chief Baron out of the Chancery, who all agreed upon all this matter appearing, that nothing shall be said to be rendred but that which indeed was given by the Fine, and Karkian does not pass to the said William Kelly by the Fine, for as to it, the Fine is but as a Release of Peter to him, and therefore shall not be said to be rendred to the said Peter by the Fine, where no matter appeareth, whereby it may appear that it was the intent

tent of the Parties that this shall be rendred. And therefore Popham said, that by so many Fines which have been levied in such a manner, and to such who have Land in the same Towns where the Conualce hath been (considering that always more Land is comprised in Fines by number of Acres, then Men have, or is intended to pass) by them at some time, or in some Age, it would have come in question if the Law had been taken as Manwood took it, but in all such Cases the Possession hath always gone otherwise, which shews how the Law hath been always taken in such Cases.

And therefore if a Man be to pass his Mannor of D. to another by Fine Executor, and he levy the Fine to him by the name of the Mannor of D. and of so many Acres of Land in D. and S. being the Towns in which the Mannor lies, after which the Conuoz purchaseth other Lands in these Towns, the Fine before the Statute of Uses shall not be executed of these Lands purchased after the Conualce, and the Fine shall work to these which he had power and intent to pass, and no further.

And it seemeth to them, that an Use may be averred without Deed upon a Fine sur Render. And all agreed that if there had been a Deed to have declared the purport of the Fine, that the Fine shall not be taken to extend further than is comprised in the Deed. And what is the cause thereof, the Deed or the intent of the Parties: and none can say but that it is the intent of the Parties, and not the Deed, and the intent may as well appear without the Deed, as with it, albeit it be not so conclusive by Parol as by Deed.

And therefore suppose I have 100 Acres of Land in a Close in D. and I. S. hath another 100 Acres in the same Close and Town, and I. S. hath 100 Acres of Land in the same Town out of this Close, and my intent is to levy a Fine to I. S. of the whole Close by the name of 200 Acres of Land, with a Render as before, and I levy it accordingly, shall the Render enure to the Land, which I. S. had in the same Town? It is clear that it shall not, although it be without Deed: Why then shall the Fine here be taken to work rather to the Land called Karkian, than to any other Lands which any other had in the same Towns, when it appeareth plainly, that it never was the intent of the Parties; that the Fine should extend to these Lands called Karkian, and it was decreed in Chancery accordingly.

Hall *versus* Arrowsmith.

4. ¶ the Case between Hall and Arrowsmith, it was agreed by the whole Court in the King's Bench, That if a Copy-holder for life hath Licence to make a Lease for three years, if he shall live so long, and he makes a Lease for three years without such a Limitation, that yet this is no Forfeiture of his Estate, because the Operation of the Law makes such a Limitation to the Estate which he made, to wit, that it shall not continue but for his life, and then such an express Limitation in the Case where the Law it self makes it is but a mere trifle; and yet if a Lease for life makes a Lease for years, and he in the Reversion confirm it, it remains good after the death of the Tenant for life, but this then shall be as if it had been made by him in the Reversion himself, and shall be his Lease: But if the Lease there had been made determinable upon the life of Tenant for life, the Confirmation thereof by him in the Reversion will not help him after the death of him who was Tenant for life. Causa patet.

But in the principal Case, if the Copy-holder had had an Estate in Fæ by Copy, it had been a Forfeiture of his Estate to make an absolute Lease, because in that Case he does more than he was licensed to do.

And they agreed that such a Licence cannot be made to be void by a Condition subsequent to the Execution thereof, to undo that which was once well executed. But there may be a Condition precedent united to it, because in such a Case it is no Licence until the Condition performed; but the Licence before mentioned is not a conditional Licence, but a Licence with a Limitation, and therefore had not been of force, if the Limitation which the Law makes is this Case had not been, and the Limitation in Law shall be preferred before the Limitation in Deed, where they work to one and the same effect, and not different.

Arthur Johnson's Case.

5. Arthur Johnson was possessed of a Term for years, and so possessed, also signed this over to Robert Waterhouse and John Waterhouse, being Brothers to the Wife of the said Johnson, to the use of the said Wife; the said Johnson dies, and makes his Wife his Executrix, after which the said Wife takes Robert Witham to Husband, who takes the Profits of the Land during the life of his said Wife, the Wife dies intestate, her said Brothers being next of kin to the said Wife, took Administration as well of the Goods of the said Wife, as of her first Husband. And whether the said Waterhouses, or the said Witham shall have this Lease, or the Use thereof, was the question in the Chancery, and thereupon put to the two Chief Justices, upon which they and the Chief Baron, and all the other Justices of Serjeants Inn in Fleet-street, and Beaumont also were clear in Opinion, that the said Administrators had now as well the Interest as the Use also of the said Term, as well in Conscience as in Law, and that they had the Use as Administrators to the said Wife, and that the said Witham shall not have it, because it is as a thing in Action, which the Administrators of the Wife always shall have and not the Husband. As if an Obligation had been made to the use of the Wife: And this Opinion was certified accordingly to the Lord Keeper of the great Seal of England, and it was so decreed.

Taunton *versus* Barrey.

6. In an Ejectione firmæ brought by Giles Taunton Plaintiff, in the King's Bench, against Giles Barrey Defendant, the Case was thus.

John Coles Esquire, made a Lease of the Lands in question to the Father of the said Barrey, for divers years, depending upon the life of the Lessee, and of the said Defendant, and of the Survivor of them, upon condition that the said Father should not alien without the consent of the said Coles and his Heirs, after which the said Father devised the Term to the said Defendant and died, making his Executor, who assented; And the question upon this Point found upon a special Verdict, was, whether upon the matter the Condition were broken; and by the Opinion of the whole Court adjudged that it was, for in such a Case he ought to have left it to his Executor, without making any Devise of it, for the Devise is an Alienation against him, and therefore it was agreed that the Plaintiff should recover the Term, 37 Eliz. Rot. between Roper and Roper.

Mich. Term, 38 & 39 Eliz.

Everet's Case.

1. **T**his Case was moved by the Chief Justice to the other Chief Justices at Serjeants Inn in Fleet-street, concerning one Everet, who before was attaint for Stealing of an Horse, and reprieved after Judgment, and indicted again for stealing another Horse before this Attainder: And the Vicar of Perton, in the County of Somerset was indicted as Accessary before this Felony, for the procurement of it; and Everet being again indicted upon the last Indictment, did not plead that he was formerly indicted of another Felony, &c. but acknowledged the Judgment whereby the Accessary was arraigned, tried, and found guilty, and had his Judgment also as the Principal, but the Execution of the Accessary was respite: And now moved whether upon this matter it shall be fit to execute the Accessary, the Principal being executed.

And it seemed convenient to all the Justices and Barons that he shall be executed, and that the matter was clear in this Case, because the Principal did not take advantage of his first Attainder by way of Plea, but acknowledged the Deed, in which Case the Accessary may well be arraigned: But if the Principal had pleaded his former Attainder, whether now he shall be put to answer for the benefit of the Queen, having regard to this Accessary, who otherwise shall go quit, because there was not any principal, but he who was formerly attainted.

And it seemed to Popham and some others, that it shall be in the same manner, as if the same Person so formerly attainted should be tried now for Treason, made before his Attainder, as appeareth by 1 H. 6. 5. because it is for the advantage of the King in his Escheat of the Land: and notwithstanding, that it is moved by Stamford in his Pleas of the Crown, it seemed to Popham that there was no diversity where the Treason was made before the Felony of which he is attainted, and where after and before the Attainder: And by the same reason that he shall be again tried for the benefit of the King in this Case because of the Escheat, by the same reason in this Case here, because of the Forfeiture which accrueth to the Queen by the Attainder of the Accessary, and for the Justice which is to be done to a third Person, who otherwise by this means shall escape unpunished.

But he agreed, that the Party attainted shall not be again arraigned for any other Felony done before the Attainder, in case where no Accessary was touch'd before the Statute of 8 Eliz. cap. 4. he who is convict of Felony, and hath his Clergy after his Purgation made, shall be arraigned for another Felony done before the Conviction, if it be such for which he cannot have his Clergy, and was not convicted or acquitted of the same Felony before the Attainder: But upon this Statute it appeareth, that he who shall have his Clergy in such manner, shall not be drawn in question for any other Felony done before his Attainder, for which he might have his Clergy.

And of this Opinion (as Clark and others of the Justices said) were all the Justices in the time of Wray. And as to the Statute of 18 Eliz. cap. 7. It is not to be understood but that he who hath his Clergy, and delivered according to this Statute, shall be yet arraigned for any other Felony done before his former Conviction or Attainder, if it be such for which he cannot have his Clergy; for the words are, That he shall be put now to answer, &c. in the same manner as if he had been delivered to the Ordinary, and had made his Purgation, any thing in this Act to the contrary notwithstanding.

Pollard *versus* Luttrell.

2. **P**ollard *versus* Luttrell, upon a Title between the Lord Audeley and Richard Audeley, it was agreed by the Chief Justices, that if the disseisor levy a Fine with Proclamations according to the Statute of 4 H. 7. and a stranger within five years after the Proclamations enter in the Right of the disseisor, without the Privity or Consent of the disseisor, that this shall not avoid the Bar of the Fine, unless that he assent to it within the five years, for the words of the Statute are, so that they pursue their Title, Claim or Interest by way of Action, or lawful Entry within five years, &c. and that which is done by another without their Assent, is not a pursuing by them according to the intent of the Statute, for otherwise by such means against the Will of the disseisor, every stranger may avoid such a Fine, which was not the intent of the Statute.

Mountague *versus* Jeoffreys and others.

3. **T**respass by Edward Mountague Plaintiff, against Richard Jeoffreys and others Defendants, for a Trespass done in certain Lands called Graveland, in Hailsham in the County of Sussex, the Case upon a Special Verdict was thus.

Sir John Jeoffreys late Chief Baron, being seised in his Demesne as of Fee (amongst others) of the said Land called Graveland having Issue but one only Daughter, by his Will in Writing devised all his Land of which he was seised in Fee (except the said Graveland) to his said Daughter for 21 years, &c. and the said Land called Graveland (which was then in Lease for divers years, to one Nicholas Cobb, which years at the time of the death of the said Sir John Jeoffreys continued) he devised to the said Richard Jeoffreys his Brother, and his Heirs, and by the same Will he disposed divers Legacies of his Chattels, and the Remainder he gave to his said Daughter, and made her Executrix of his said Will; after which the first Wife of the said Sir John Jeoffreys being dead, he covenanted with Mr. George Gozng to take the Daughter of the said George to Wife, and covenanted with the said George (amongst other Lands) to assure the said Land called Graveland to the said George Gozng and Richard Jeoffreys, and their Heirs, to the use of the said Sir John Jeoffreys, and Mary Gozng Daughter of the said George, and the Heirs of the said Sir John Jeoffreys, by a certain day, before which day the Marriage being had, the said Sir John Jeoffreys made a Deed and sealed it, and delivered it, containing a Feoffment of the said Land called Graveland (amongst others) to the said George Gozng and Richard Jeoffreys, and their Heirs, to the Uses aforesaid, in performance of the said Covenants, with a Warrant of Attorney to make Livery accordingly, and the Attorney made Livery in other parts of the Land, and not in Graveland, and this was in the name of all the Lands comprised in the Deed, and the said Nicholas Cobb never attorned to this Deed; After which Sir John Jeoffreys interlined in the said Will, that the said Mary then his Wife should be joynnt Executrix with his Daughter: And in the Legacy of the rest of his Goods, &c. he interlined the said Mary his Wife to be Joynnt Tenant with his said Daughter, without other Publication thereof; and afterward the said Sir John died, the said Daughter being his Heir, who took to Husband the said Edward Mountague.

4. **I**n Trespass, the Plaintiff supposed the Trespass to be done in the breaking of his House and Close in such a Town, the Defendant justifies in an House and Close in the same Town, and shews which, to put the Plaintiff to his new Assignment, to which the Plaintiff replied that the House and Close of which he complains is such an House, and gives it a special name, upon which the Defendant demurs, and adjudged that the Plaintiff take nothing by his Writ: for albeit an House may have a Curtilage which passeth by the name of a Pessuage with the Appurtenances, yet this shall not be in this Case, for by the Bar the Plaintiff is bound to make a special Demonstration in what Pessuage and what Close he supposeth the Trespass to be done, as to say that the House hath a Curtilage, the which he broke, and it shall not be taken by Intendment that the Pessuages had such a Curtilage to it, if it be not specially named.

Fennor's Case.

5. **I**n Trespass brought by Fennor in the Common Bench, against for breaking his Close in, &c. the Defendant pleads a Bar at large, to make the Plaintiff assign the place in certain, where he supposeth the Trespass to be done, the Plaintiff thereupon alledgedeth that the place where he complaineth is such, &c. and sheweth in certain, another then that in which the Defendant justifies, the Defendant avers that the one and the other are all one, and known by the one name and the other, and thereupon the Plaintiff demurs, and adjudged there for the Plaintiff, because that in such a Case upon such a special Assignment, it shall be taken merely another than that in which the Defendant justifies, in as much as the Plaintiff in such a Case cannot maintain it upon his Evidence given, if the Defendant had pleaded Not Guilty to this new Assignment, that the Trespass was done in the place in which the Defendant justifies, although it be known by the one and the other name, and that the Plaintiff hath good Title to it, because that by his special Assignment, saying, that it is another than that in which the Defendant justifies, he shall never after say, that it is the same in this Plea, for it is mere contrary to his special Assignment: And upon this a Writ of Error was brought in the King's Bench, and the Judgment was there affirmed this Term for the same reason, Quod nota.

Scot versus Sir Anthony Mainy.

6. **I**n Debt upon an Obligation of 200 l. brought by John Scot Gent, against Sir Anthony Mainy Knight, the Condition whereof being to perform the Covenant comprised in an Indenture of Demise made by the said Sir Anthony to the said Plaintiff, of his Capital Pessuage in Holden with the Lands to it belonging, &c. amongst which Covenants one was, that whereas by the same Indenture he had demised it to him for 21 years, that the said Sir Anthony covenanted with the said John Scot, that the said Sir Anthony from time to time, during the life of the said Sir Anthony, upon the Surrender of this Demise, or any other Demise hereafter to be made by the said Sir Anthony, of the said Pessuages and Lands, and to be made by the said John Scot, his Executors or Administrators, and upon a new Lease to be made ready ingrossed to be sealed and offered by the said John Scot, his Executors or Administrators to the said Sir Anthony, for the like term and number of years in the aforesaid Indenture comprised for the same Rent, &c. to seal and deliver to the said John Scot, his Executors and Administrators. And the said Sir Anthony as to this Covenant pleaded, did not surrender, nor offer to surrender to him the said Demise, nor offer to him any new Demise of the Premises, ready ingrossed for to seal it for the like term, &c. as it is in the Covenant.

And

And for the other Covenants he pleads Performance of all; To which the Plaintiff replies, that the said Sir Anthony after the Obligation, and before the Action brought, had rendered the said Possessions and Lands by Fine to one Walter Savage and William Sheldon their Executors and Assigns for eighty years, from the Feast of Easter next before the Fine which was Pasch. 36 Eliz. whereby he said, that the said Sir Anthony had disabled himself to renew his Lease according to the Covenant, upon which it was demurred in the Common Bench, and the Judgment given for the Plaintiff, as appeareth, Trin. 37 Eliz. Rot. 2573. And upon this Judgment a Writ of Error was brought in the King's Bench and agreed this Term. And it was moved that the Judgment given was erroneous, in as much as the first Act was to be done by John Scot before the new Lease was to be made, to wit, the Surrender of the former Lease, and the drawing of the new one ought to have been done by the Plaintiff, which not being done on his part, the said Sir Anthony is not bound to make the new Lease.

And also it was moved, that as the Case is here, the said John Scot might surrender to the Defendant, notwithstanding the intervening of this Lease between the Lease of the Plaintiff, and the Inheritance of the Defendant, as if a Man make a Lease for years in Possession, and afterwards make another Lease to a Stranger, to begin after the end of the former Lease, this shall not hinder but that the first Lease may be surrendered to him who was the Lessor, notwithstanding the said Term intervening.

To which it was answered by the Court, that the Plaintiff here need not to make an Offer of the Surrender of his Term to the said Sir Anthony, in as much as the said Sir Anthony hath disabled himself to take the Surrender, or to take the Lease according to the purport of the Condition, and by this disabling of himself the Obligation is forfeited, Come per 44 E. 3. 8. and by Littleton also, If a Man make a Feoffment, upon condition to re-enfeoff him, this is not to be done until Request thereof be made by the Feoffor, yet if in the mean time the Feoffee suffer a fained Recovery of the Land, grant a Rent-chARGE, acknowledge a Statute, take a Wife, or the like, the Feoffor may re-enter, without Request made to re-enfeoff him, and the reason is, because that by any of these the Feoffee hath disabled himself to perform the Condition in the same plight, as he might have done at the time of the Feoffment, in the same manner here, for by this Render by the Fine, the Reversion pass in Right, so that the Termes in Possession attaining to it, they shall have the Rent reserved upon the first Lease, and therefore the Plaintiff cannot now surrender to the said Sir Anthony, but to the Grantees of the Reversion, and therefore there shall be no prejudice to the Plaintiff, because the Defendant was the cause of disabling the Plaintiff to make the Surrender to him. And suppose it be but a Term to begin at a day to come, yet by this the Obligation is forfeited, because the Obligor hath thereby disabled himself to perform the Condition in such a plight as he might have done it when the Obligation was made, whereby the Obligation is presently forfeited, albeit the Plaintiff never surrendered nor offer to do it: And therefore the Judgment there was affirmed.

Mounson *versus* West.

7. **I**n an Assize brought in the County of Lincoln, before Gawdy and Owen, by Thomas Mounson Esquire, Demandant, against Robert West Tenant for Lands in Sturton, Juxta Scru. The Defendant West pleaded Nul Tenement del Franc-tenement named in the Writ, and if that be not found, then Nul tort, nul disseisin: And the Assize found that the said Defendant was Tenant of the Tenements now in Plaintiff, and put in view to the Recognitors of the Assize,

Allise, in manner and form as the Writ supposeth: And further that the said West thereof dissembled the said Mounson namely of the Tenements in the Will of one Mounson: And did not find either the words of the Will, nor the Will it self what it was, &c. And the Justices of Allise upon this Verdict upon Advice with the other Justices, gave Judgment, that the Plaintiff shall recover, &c. upon which a Writ of Error was brought in the King's Bench, where it was moved that the Judgment was erroneous: First because the Jury have not found that the Defendant was Tenant of the Free-hold, agreeing with the form of the Plea, for the Writ of Allise doth not suppose him to be Tenant of the Free-hold, and therefore the Verdict in this Point not fully found.

The second Error is, that the Seisin of the Plaintiff is not enquired of, according to the Charge given to them, as well as the Disseisin, for the Charge was that they should enquire of the Seisin of the Plaintiff, &c. But to both these the Court answered that the Verdict was well enough, notwithstanding these Exceptions, for every Allise brought supposeth that there is a Disseisor, and a Tenant named in it, then this Allise being brought against a sole Person, supposeth him to be a Disseisor and Tenant also; and therefore the Verdict saying, that he was Tenant as the Writ supposeth, is now as strong in this Case, as if they had found that he was Tenant in the Free-hold, for the Tenant of the Free-hold ought to be named in the Writ: But if the Allise had been brought against two, or more, such a Verdict had not been good, for it sufficeth if any of them be Tenant of the Free-hold, and then the Writ doth not suppose one to be Tenant more than another, but supposeth one Tenant to be named in the Writ. And therefore in such a Case the finding ought to be special, to wit, that such an one is Tenant of the Free-hold, or that there is a Tenant of the Free-hold named in the Writ. But where one only is named in the Writ to be Disseisor and Tenant, it is sufficient to find as here, for by this it is certainly found that he is Tenant of the Free-hold.

And for the other Point, although it be a good direction for the Judges to the Jury, whereby they may the better perceive that there ought to be a Seisin in him, or otherwise there cannot be a Disseisin by the other, yet in Deed he cannot be Disseised who was not then seised: But the Allise having found the Disseisin, the Seisin in Law is found included in the Disseisin. But for the Point moved, that the Verdict was not perfect, in as much as they found the Disseisin with a Nisi, it seemed to Gaudy that the Judgment upon the Verdict was erroneous, as where a Verdict in another Action is imperfect, a Venire facias de novo shall be awarded to try the Issue again: And if Judgment be given upon such a Verdict it is Error; so here the Verdict in this Point being uncertain, there ought to have been a Certificate of Allise to have this better opened: But the three other Justices held (as the Case is) that the Verdict in this Point is certain enough, for that which cometh before the Nisi (as it is placed) is meerly nugator, as in the Case of the Lord Stafford against Sir Rowland Heyward, the Jury found Non assumpit, but if such Witnesses say true (as they believe they did) Assumpit, &c. it was but a mere Pugation.

But it seemed to Popham, that if the Verdict had been, if the words of the Will do not pass the Land, then that he dissembled, and if they pass, then that he did not dissemble; there if the words of the Will be not found, the Verdict had been all imperfect, but here the Verdict is full and perfect before the Nisi, &c. and therefore the Judgment was affirmed.

Holme *versus* Gee.

8. A Formedon in Descender was brought by Ralph Holme Demandant against Henry Gee and Elizabeth his Wife Tenants, and the Case was thus.

Ralph Langley and others gave two Messuages and a Garden, with the Appurtenances in Manchester, to Ralph Holme the great Grandfather of the Demandant, and to the Heirs of his Body begotten, after which the same great Grandfather by Deed indented, dated 20 September, 14 H. 7. enfeoffed John Gee of one of the said Messuages, and of the said Garden, rendering yearly to the said great Grandfather and his Heirs 13 s. 4 d. a year, at the Feasts of S. Michael, and the Annunciation by equal Portions, after which the said John Gee died seised of the said Messuages and Garden, and it descended to Henry Gee his Son and Heir; after which the said great Grandfather by his Indenture, bearing date 6 Martii, 12 H. 8. enfeoffed the said Henry Gee of the other Messuages, rendering also to him and his Heirs yearly 13 s. 4 d. at the said Feasts aforesaid, by equal Portions, after which Holme the great Grandfather died, Stephen Holme being his Son and next Heir, who was seised of the Rents aforesaid, and afterwards also died seised, Robert Holme being his Son and Heir, after which the said Henry Gee died seised of the said two Messuages and Garden, and they descended to Elizabeth his Daughter and Heir, who took to Husband one Richard Shalcroft, and had Issue the said Elizabeth, Wife of the said Henry Gee, Tenant in the Formedon, after which the said Richard Shalcroft and his Wife died, after which, and before the Marriage had between the said Henry Gee and Elizabeth now Tenants in the Formedon, the said Elizabeth enfeoffed one Richard Grænsearch of the said Messuages and Garden, after which, to wit, at the Feast of the Annunciation of our Lady, 3 Eliz. the said Henry Gee Husband to the said Elizabeth, paid 13 s. 4 d. for the said Rent reserved as is aforesaid, to the said Robert Holme, after which, to wit, on Monday next, after the Assumption of our Lady, at Lancaster, before the Justices there, a Fine was levied with Proclamations according to the Statute, between Thomas Aynsworth and Thomas Holden then being seised of the Tenements aforesaid Complainants, and the said Henry Gee and Elizabeth his Wife, Deforceants of the Tenements aforesaid, whereby the Conuance was made to the said Thomas, and Thomas who rendred them to the said Henry Gee and Elizabeth his Wife, and to the Heirs of their Bodies, the Remainder to the right Heirs of the said Henry: the five years past after the Proclamations in the life of the said Robert Holme, after which the said Robert died, and Ralph his Son and Heir brought the Formedon upon the Gift first mentioned, and the Tenants plead the said Fine with Proclamation in Bar, and the Demandant replied, shewing the several Discontinuances made by the great Grandfather as aforesaid, and the Acceptance of the said Rent by the said Robert, by the hands of the now Tenant Henry Gee as is before alledged, and that the said Henry was then seised of the said Tenements in Fee in Right of the said Elizabeth then his Wife, and although that he alledged the said several Feoffments to be made by Deeds indented, with the Reservation as aforesaid, yet it is not mentioned in the Replication that he shews forth the Deeds whereby the Reservation was made; to which the Tenant by way of Re-joynder shew the Feoffment made by the said Elizabeth Shalcroft to the said William Green-ditch, whereby he was seised at the time of the Payment of the said Rent at the said Feast of the Annunciation of our Lady, and traverse Ablique hoc, that the said Henry Gee was thereof then seised in Right of his Wife, in manner and form, whereupon it was demurred in Law, and adjudged by the Justices of Assise at Lancaster, that the Plaintiff should be barred, whereupon the Tenants have now brought their Writ of Error.

And

And by Popham and Clench the Judgment is to be affirmed; First, because that the Acceptance of the said Rent had been by the hands of one who was to pay it, to wit, the Tenant himself, yet this shall not bar the Right of Incail in the said Robert Holme (as a Release of his Right should do) but this Acceptance shall only foreclose him of his Action, to demand the Land during his life, and therefore the Right which the said Robert had, being barred by the Fine, the Son is without Remedy, for the Son shall never have Remedy upon the Fine levied in time of his Father, the five years after the Proclamations being passed: But in Case where the Right begin first to be a Right in the Son, and not where there was Right in the Father.

And further it seemeth to them, that the Payment of him who had not anything in the Land at the time of the Payment, as here, shall make no conclusion to him who accept it, because this Payment is as none in Law.

And by them the Rejoyndure of the Traverse, Absque hoc, that Henry Gee was seised at the time of the Payment in Fee, in Right of his said Wife, in manner and form, as in the Replication is alledged, is good enough, for he traverseth that which the Demandant hath specially alledged to destroy the Bar, and contrary to that which is alledged, it shall not be intended that they had other particular Estate at the time of the Payment, which may make the Payment to be good.

And albeit the Traverse had been, Absque hoc, that the said Henry was seized in Right of his said Wife, Modo & forma prout, the Demandant hath alledged without saying in Fee, as it is pleaded here, yet the Jury shall be put to find it, if he were seised in Fee, In jure Uxorii, and not of any other particular Estate, as in 12 E. 4. 4. A Feoffment is pleaded by Deed, the other makes Title, and traverseth Absque hoc, that he enfeoffed Modo & forma, not shewing forth the Deed, yet he who pleads the Feoffment, by Littleton, shall give no other Feoffment in Evidence, than that which is pleaded by the Deed. And by 18 E. 4. 3. In Trespass the Defendant justifies the Entry and sowing of Corn, because that M. was seised in Fee, and sowed the Land, and the Defendant as his Servant entered and cut it, the Plaintiff saith, that it was his Free-hold at the time of the sowing, Absque hoc, that it was the Free-hold of the said M. and per Curiam, it is not good, for such matter was not alledged by the Defendant, but he ought to traverse the Seisin in Fee, which was alledged, and good, and so it is good here.

But it seems to Clench, that the Replication is not good, because he doth not say, by the Writing upon which the Reservation was made, which concludes Robert by his Acceptance. Hic in Curia prolat. as by Hill. 15 E. 4. 15. If a Man will bar a Woman of her Action for her Land after the death of her Husband, by Feoffment made by the Baron and Feme, during the Couverture by Deed, rendering Rent, by reason of Acceptance of the said Rent after the death of her Husband, he ought to shew the Deed, and say, Hic in Curia prolat. or otherwise the Plea is not good, because that in such a Case albeit it were a Gift in Tail, the Wife shall not be concluded by her Acceptance unless that the Gift were by Deed.

Popham, True it is, in case the Party will demur upon it: but suppose in this Case, the Tenants had expressly acknowledged the said Feoffments, and then concluded afterwards as they have done here, shall they afterwards take advantage of not shewing the Deed? I think that not, no more here where they admit it, and plead the other matter to avoid the Conclusion; for if a double Plea be pleaded, if the other Party demur upon it, he shall take the advantage of the doubleness: But if he palls it over, and they proceed in pleading upon another Point, the doubleness is gone.

And Fennor said, that the Right which is intended to be saved within the first Branch of the Statute of 4 H. 7. is, that upon which the Party may pursue his Action, or enter for his Remedy, the which the said Robert could not do in, when the Fine was levied, because he had accepted the Rent, but the first Right which was in such a Case, was that in the Demandant.

Stroud *versus* Willis.

9. **I**n a Debt upon an Obligation of 40 l. by William Stroud Plaintiff, against John Willis Defendant, the Condition whereof was, If the said Willis his Heirs, Executors, or Assigns, should pay or cause to be paid yearly to the said William Stroud, the Rent, or sum of 37 l. 10 s. of lawful Money, at the Feast of S. Michael, and the Annunciation, by equal portions, according to the Tenure, true intent, and meaning of certain Articles of Agreement indented, made between the said Parties of the same date, that the Obligation was, that then the Obligation shall be void, and the Defendant shew the Articles, which were thus, to wit, that the said William Stroud had demised to the Defendants all such Tenements in Yeatminster of, or in which the said William then had an Estate for life by Copy. Anglice Copie des, except according to the custom of the Manors of Yeatminster, from the Annunciation of our Lady then last past, for forty years, if the said William should so long live, rendering yearly to the said William 37 l. 10 s. of lawful Money, at the Feasts of S. Michael, and our Lady, by equal portions, under the East-Gate of the Castle of Taunton, in the County of Somerset, &c. with divers things comprised in the said Articles. To which Points the Defendant pleaded, that at the time of the making of the said Articles the Plaintiff had not any Estate in the Tenements in Yeatminster aforesaid, for Term of his life, by Copy, Anglice Copie des, except according to any Custom of the said Manors of Yeatminster, and that the Obligation was made for the Payment of the same Rent reserved by the said Articles, and demands Judgment, &c. Whereupon the Plaintiff demurred in the Common Bench, and there Judgment was given that the Plaintiff should recover his Debt and Damages, as appeareth there, Mich. 36 & 37 Eliz. Rot. 312. upon which a Writ of Error was brought in the King's Bench, and there moved that the Judgment was erroneous, in as much as upon the matter he ought to have been barred of his Action : for if an Action of Debt had been brought upon the Demise, by the Articles, the Defendant might have pleaded as here, and the Plaintiff should be clearly barred : As if a Man be bound to make an Estate, or to assure to another all the Lands which he hath by Descent from his Father, or all the Lands which he hath by Purchase from such an one, or the like.

And of this Opinion Gaudy was, saying, in as much as the Obligation is, that he shall be paid according to the true intent of the Articles, the intent of them is not that the Rent shall be paid if any Land be not passed by them, for it should be paid, as by 22 H. 6. if a Man be bound to pay a Rent which is reserved upon a Lease made to him, he ought to pay it at his peril : But if it be to pay it accordingly to the Lease, there he said, it is not payable but upon the Bond, and is to be paid as a Rent. And if the Land be evicted in the interim before the day of payment, the Obligor shall help himself by pleading of it upon such an Obligation to discharge the Bond, so here : But it seemed to Popham, that the Judgment was well given, and yet he agreed the Cases that were put ; but he said there was a Diversity where the Obligation goes in the Generality, and where it tends to a Specialty : for as by 2 E. 4. If a Man be bound to be Non-suit in all Actions which he hath against such

such an one, or to assure to another all his Lands in Dale, he may say, that he hath not any Suit, or that he hath no Land in Dale: But if it be that he shall be nonsuit in a Formedon depending, or to enfeoff him of White Acre, there it is no Plea, because he refers to a special Point. And by 18 E. 4. If a Man be bound to another to pay him 10l. for which a Stranger is bound to the said Oblige, it is no Plea for him to say, that the Stranger is not bound to pay him 10l. for when the Condition refers to such a special matter, this cannot be denied of him who is bound.

And therefore in this Case the Defendant cannot say, that there were not any such Articles, contrary to that which is specially comprised in the Condition, as by 28 H. 6. A Man was bound to perform the Covenants comprised in a certain Indenture of Covenants, he shall not say, that there was not any such Indenture, because it relates to a Special.

So I think, if a Man be bound to pay the Rent of 10l. a year reserved upon an Indenture of Demise made of Lands in D. payable at such a Feast, he shall not say against it, that there was no such Demise made, nor no such Rent reserved upon the Demise, but is estopped of the one and the other. And in Hill. 3 Eliz. A Man was bound that he shall pay to A. or the Oblige, all such sums of Money as T. S. deceased stands bound to pay by his Obligation to the said A. and of one R. P. to the behoof of the Children of such an one, according to the Will of the said Party; and in Debt upon this Obligation he saith, that the said T. S. was never bound by any such Writing Obligatory to the said A. and R. P. &c. to pay, &c. Pro usu filiorum, &c. as in the Condition, and per Curiam adjudged no good Bar, because he is estopped to deny the special matter, which is matter of Writing, and not a bare matter in Deed.

Kirton versus Hoxton, and others.

10. ¶ an Appeal of Mayhem brought by Kirton Plaintiff, against Appeal of Robert Hoxton Esquire, and divers other Defendants, the one of the Defendants plead Nul tiel in rerum natura, as another of the Appellants, and if it be not found then as to the Felony and Mayhem Not Guilty: Agreed by the whole Court that such a manner of pleading is not to be suffered in an Appeal of Mayhem, because no Life is put in danger by the Suit: And yet it was objected that there are presidents, that such form of pleading hath been admitted in Appeals of Mayhem. But the Court had respect to it, that the reason in all the Books of Law in which it hath been admitted in an Appeal of death, and the like, is, that it stands in Favorem vice, and therefore it is admitted to be good, or otherwise by the Books, it shall not be admitted to be so, for the doubleness of it: But no Life is to be put in jeopardy in this Case, and therefore such a Plea shall not be admitted, but the Not Guilty shall stand, by which the other Plea is waived.

Hillary Term, 38 Eliz.

Henry Earl of Pembrook *versus* Sir Henry Barkley.

See this Case
Coke lib. 5. 76.
2. **I**n an Action upon the Case, between Henry Earl of Pembrook Plaintiff,
and Sir Henry Barkley Knight Defendant, the Case upon the pleading
appeareth to be thus.

The said Earl was seised in his Demesne as of Fee, of the Mannor of Stockteft, in the County of Somerset, to which manner the Office of the custody of the Forest of Heltwood, in the same County belongeth, and also that there was before time of memory, an Office within the same Forest called the Lieutenantship, or Custody of the said Forest belonging to the said Mannor, of which also the said Earl was seised in his Demesne as of Fee: And that there was one part of the said Forest called the West part of the said Forest, in which there were two Walks, or Bayliwicks, the one called Staverdale Walk, and the other Bewick Walk: And that the said Lieutenant had the Charge of the Deer, and the Disposition and Appointment of the Keepers of the said Forest. And that the said Earl being so seised, by his Writing, bearing date 5 November. 12 Eliz. reciting that his Father had granted the Office of Lieutenantship, and Deputyship, of the said West part of the said Forest, Cum vadis, &c. quando acciderit, and the Keepership of Bewick Walk aforesaid, to the said Sir Maurice Barkley Knight, and the Heirs Males of his Body, and instituted and ordained him, and the Heirs Males of his Body, Lieutenant and Deputy thereof to the said Earl and his Heirs, confirmed the Grant aforesaid.

And further by the same Deed granted and confirmed to the said Sir Maurice, and to the Heirs Males of his Body, the said Lieutenantship and Deputyship of the said West part of the said Forest, and also the Keepership of the said Walk called Staverdale Walk, together with the Lodges, &c.

Provided always, and the said Sir Maurice covenanted and granted, for him and the Heirs Males of his Body, with the said now Earl his Heirs and Assigns, that it shall be lawful for the said Earl his Heirs and Assigns, to have all the Preheminence or Commandment of the said Game and Hunting, and pleasure there, as if this Grant had not been made.

Provided also, and the said Sir Maurice covenanted, granted and promised for him, and the Heirs Males of his Body, to, and with the said Earl, his Heirs and Assigns, that the said Sir Maurice and the Heirs Males of his Body, and their Assignees and Assignees, will preserve the Game as fair as it commonly hath been used, and that neither the said Sir Maurice, nor any of the Heirs Males of his Body, nor any of their Assignees, will cut any manner of Wood growing upon any part of the Premisses, unless for necessary Brouse, and such as they may lawfully cut of their own, and as was accustomed, &c. after which Sir Maurice died, and Sir Henry Barkley his Son and Heir Male, cut four Gaks within the said Walk called Bewicks, growing upon the Soil of the Queen there, every one of them being Timber, and of the value of 13 s. 4 d. and converted them to his own use. And whether by this Act done by the said Sir Henry, the now Earl of Pembrook may re-enter into the things granted by him, was the Question, which stands upon two Points, the first, Whether the last Proviso makes a Condition, or be but a meer Covenant. 2. Whether this Act makes a Forfeiture of the said Offices granted as before by the course of the Common Law.

Gawdy, Clench, Walmley and Beaumont, that the first Proviso is not a Condition, either because he is not by this to do more than he may do by his Superior Custody, in which Case he ought to do it by his own Authority, as to take

take his Fœ-Doe, or to chase and kill Deer by Warren, and the like; or otherwise if it shall be taken, that he may by this Proviso kill or chase the Game at his pleasure, it is hold, because among it, he is to do that which he ought not to do by his Office, to wit, to destroy the Game, which by his Office he is to preserve; and therefore for the first, it stands merely upon the Covenant.

Then when he saith further in the second Clause; Provided also, and the said Sir Henry Barkley covenants, this is to be intended that it shall be as the other for the word also, and this is but a bare Covenant as the first was.

And they said further, that this last Proviso shall be laid entirely the words of the Grantor himself, as the Covenant is, and without words of the Grantee; a Condition cannot be, for it is for him to condition with the Estate given, and not for him to whom the Grant is made: And therefore suppose that it had been on the other part, to wit, Provided always, and the Grantee covenant that the Grantor shall have the Relye of the Bourke, and the like; this shall not be laid to be any Condition, but a mere Covenant: In like manner shall it be on the other part.

And further, it is common for Scriveners and ignorant Persons to make in effect every Covenant to begin with a Proviso in this manner, and therefore to expound such a manner of Proviso as a Condition, it shall be no perilous to the Estates of Men.

And for the Case upon the Lease made by Serjeant Bendloes, which was thus.

Provided always, and it was covenanted, granted and agreed between the Parties, if the Lessee sell or alien the Term, that the Lessor shall have the Preferment, This they agreed to be a good Condition, as was adjudged in the Common Bench, 32 Eliz. but the Case there is, because they are the words as well of the Lessor, who may add a Condition to the Estate, as of the Lessor who made the Covenant, which is not here. But they said, that the Case between Hamington and Pepull which was 17 Eliz. in the King's Bench, was more nigh in resemblance to the Case in question; which was that the said Pepull made a Lease for years to Hamington of a Farm, except the Wood; and covenanted with the Lessor that he shall take all manner of Under-wood, provided always, and the Lessor covenant that he will not cut any manner of Timber-tree, and this was adjudged no Condition. And as to the other Point they said, that the cutting of Trees by him who had the Custody of the Forest, is not a Forfeiture of his Office by the Common Law, as it is of him who hath the Custody of a Park, for there is another special Officer who hath the Charge of Wood in a Forest, to wit, the Warden and the Woodward, and therefore it is no Forfeiture of him who hath the Custody of the Forest to cut Trees, for he hath another Charge, to wit, the Custody of the Game only, and not of the Wood.

And further the cutting of one or two Trees is no cause of Forfeiture, for it may be that there is Covert-shade and Bourke sufficients of that which yet remains, in which Case it is no Forfeiture if it be not averred that these things are impaired by it.

But the Chief Justices, Chief Baron and all the other Justices and Bishops were of a contrary Opinion. And for the matter of Forfeiture at Common Law, they said that it was a cause of Forfeiture of an Office at Common Law to cut the Trees, as well in the Case of a Forester, as in the Case of a Park-keeper, for the Forester hath not only the Charge of the Game, but of all that is within the Forest by which the Game is fed, preserved, or succoured, and they are fed by the Bourke, and succoured by the shade, and have the calmer and better Lodging by reason of the Trees; and therefore by their Office they are to have a care of these things as well as of the Game, for without these the Game cannot stand: as to say, that there are others who have

have special Charge of the Wood and Pasture, as the Woodwards, or Agisters, this is no Proof that the Foresters, or Keepers are discharged thereby. And the Foresters and Keepers are by their Offices to prevent the Misdoers in the Woods within the Forests of the Woodwards, and therefore they have to do with it. And by Carta de foresta, none may cut his Wood within his Forest, Nisi per visum Forestarii, ergo the Foresters have charge thereof: And every voluntary Act done by an Officer contrary to that which belongs to his Office is a Forfeiture of his Office, as by voluntary killing of Bucks, cutting of Trees, Wood, or the like: but otherwise it is of things done or suffered by his negligence if it be not common or often. And albeit the Trees here were not many, or that it was not aevrey that the Game was to be hurt thereby, yet it cannot be intended but that it is so much impaired by it, as it should be by the killing of a Buck in the Forest, by which the Office shall be forfeited, because the Game is thereby the worse; and yet there may be Game sufficient without this Buck, but he hath voluntarily done a thing contrary to his Office, and therefore it is a Forfeiture of his Office, and so it shall be in this Case.

And for the other Point they said, it was a Condition and also a Covenant, and it was for god purpose to have it to be so: for suppose that the Game had been destroyed by the said Sir Henry, shall this be a sufficient Recompence or Satisfaction to enter for the Condition broken? No, and therefore the Covenant was made to recompence him for Damages.

When a Proviso makes a Condition.

And when upon the Habendum a Proviso is added for a thing to be done by him to whom the Deed is made, or to restrain him to do any thing, this is a Condition, as well as if it had been a Condition which shall make or shall restrain to do such a thing, for they are in this Case the words of the Grantor, to restrain the Grant in some manner, and to shew in what manner he shall have it, and it is always to him who passeth the Estate, and to no other. Then suppose here, that the Proviso had been; Provided always that the Grantee shall not cut any Tree, And the Grantee covenant also that he will not cut any Tree, this is plainly a Condition and also a Covenant; then it is as plain in the Case in question, which is; Provided also, and the Grantee covenant, &c. that he will not cut any manner of Wood: distinguish the Sentence by his proper Distinction, and it is clear that it is a Condition as well as a Covenant. And to say, that there is a diversity between this Case and that Case upon Sergeant Bendloc's Lease, because there it is, Provided always, and it is covenanted and agreed between the Parties; In which Case it is alledged, that the Agreement which is the Plaintiffs, goes to the Proviso to make it a Condition for him, as well as it shall go to the Grantee to make it to be a Covenant from him: they understand no difference, because the Provisos as it is placed, is of it self as spoken by the Plaintiff; and the Agreement between the Parties that such a thing shall be done by the Lessee, makes it a Covenant on his part only, all being to be performed by him, as plainly as in the Case in question.

And to say, that the last Proviso shall not be a Condition, because the first cannot enure as a Condition, because that which is to be done may lawfully be done with it, or without it, or because that the matter to which the Proviso is annexed, is repugnant to the nature of the thing granted, yet this is not because of the nature of the word it self, but by reason of that to which the Proviso is annexed, and therefore the Proviso following hindred in its Operation by means of the word, also: And therefore if a Man makes a Lease for years, provided always that the Lessor may enjoy and hold the Mannors of D. (which is other Land) or that the Lessee shall kill I.S. these are void Conditions; But grant then that it is further provided also that he shall not alien his Term, is not this a good Condition although that which was Precedent was no Condition? It is clear that it is not; and they said for Hamington's Case that

that it was but of the nature of a Declaration with what Wood the Lessee shall meddle, because it depends upon the Covenant of the Lessor, and it is general, to wit, that he may cut any manner of Underwood, provided that he do not cut any manner of Timber; and Popham was of Council with Hamington in this Case, and the Court at the beginning insisted much that it was a Condition, and that for the reason then alledged, that it depended upon the Covenant of the Lessor, which was general for all manner of Underwood, because that Standels growing between great Trees, might be taken within the general words of all manner of Underwood, for to make it plain it was well put in, that he shall not cut any manner of Timber-trees, and therefore in this Point it was but a Declaration, with what Wood he should meddle, although in truth it was of another thing than was comprised in the Covenant before: And then the adding of a Covenant to such a Proviso shall not make the Proviso of another nature, than it was before the Covenant made, or if no Covenant had been added to it, and upon this reason the Court then gave Judgment for Hamington. And by him, if I am seised of the Mannor of D. in D. and of Black Acre in D. and so seised, I covenant with I. S. that he shall enjoy the said Mannor for ten years: Provided and the said I.C. covenant that he shall not enjoy Black Acre, this Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration, that it is not my intent that Black Acre shall pass, be it parcel or not parcel of the said Mannor: then the Covenant following will not alter the nature of the Exposition of the Proviso which the Law shall make of it self, if it had stood of it self without a Covenant following.

And for the Proviso here, he put this Case, suppose it had been; Provided, and the Grantee covenants that he shall not cut any Trees: None will deny but that this had been a Condition and a Covenant also: And what diversity is there where the word is at the Conclusion, and so couple the Condition and Covenant together? And we are not to alter the Law for the ignorance of Scriveners, who do they know not what by their ignorance, shall be corrected by the Law.

And they agreed, that where a principal Officer is by his Office to make inferior Officers under him, and the inferior Officer commits a Forfeiture, the superior Officer shall take advantage thereof, and shall place a new Officer, as was done in 39 H. 6. for the Office of the Marshall of the King's Bench, put in by the great Marshal of England.

Easter Term, 39 Eliz.

Overton *versus* Sydall.

1. **I**n Debt between Valentine Overton Clark, Prebendary of the Prebend of Tervin in the County of Chester, founded in the Cathedral Church of Litchfield in the County of Stafford, against Thomas Sydall Executor of William Sydall, the Case appeared to be this.

Henry Sydall Clark, Prebendary of the Prebend, 26 Masi, 5 E. 6. with the Assent of the Dean and Chapter, and by Writing indented, demised the said Prebend to the said William Sydall for 43 years, from the Feast of the Annunciation of our Lady, in the year of our Lord 1555. at the yearly Rent of 36 l. William Sydall assigned over his Term, and died, making the said Thomas his Executor, Henry Sydall also died, and afterwards the Plaintiff was made Prebend, and for the Rent Arrear in his time, and after the Assignment this Action is brought against the Executors in the Debet and Detinet.

And it was alledged that in Hillary Term, 36 Eliz. Rot. 420. in the Case between Glover and Humble, it was adjudged in the King's Bench, that the Grantee of the Reversion shall not maintain an Action of Debt upon a Lease for years against the Lessee himself, for any Arrears of Rent incurred, after that he had made an Assignment of his Term over to another, and alledged also that in Hillary, 29 Eliz. in a Case between it was adjudged, that an Action of Debt lieth for the Lessor himself against the Lessee, for Arrearages of Rent reserved upon the Lease, and accrued after the Lessee had assigned his Term over; and both these Cases were adjudged accordingly in the King's Bench, and the reason in the first Case was, because that by the Grant of the Reversion over, the privy of Contract which was between the Lessor and the Lessee is dissolved, and the Grantee of the Reversion as to it but a Stranger.

But in the last Case the privy of Contract is not dissolved between the Lessor and the Lessee, notwithstanding the Lessee hath passed over his Term, neither is the Contract thereby determined betwixt the Parties.

But Fennor said, that in this Case the privy in Deed is gone by the death of the Lessee, and therefore the Executor who is but privy in Law, is not subject to this Action, unless in case where he hath the Term; in which Case he shall be charged as he who hath Quid pro quo, which is not in the Case here.

And he said further, that a Lease made by a Prebend is void no longer than his own life, but is merely void by his death, and therefore shall not be said to be a Contract to bind further than his life, and therefore also he said, that the Action will not lie in the said Case for the Successor.

But Gawdy said, that here the Lease is confirmed, and therefore good during the Term, but it seemed to him that the Executor who is but privy in Law shall not be chargeable with his Action for the Arrearages due after the Assignment over, and yet he agreed that the Heir, the Successor, and the Executor of the Lessor shall have Debt against the Lessee himself, for the Arrearages which accrues to be due after the Assignment over of the Lease:

Vit

But he said, that the Action of Debt against the Executor upon a Lease made to the Testator, and for the Arreages due in the time of the Executor, ought to be in the Debtor and Detinet, and that for the Occupation of the Term, whereby he hath Quid pro quo, which is not in this Case.

Popham said, that for the time that the Contract shall bind in nature of a Contract, there is not any difference between the Heir the Successor, and the Executor of the Lessee, and the Executor or Administrator of the Lessee, for the one and the other are equally privy to the Contract, and a Contract or Covenant especially being by writing, binds as strongly the Executor or Administrator, as the Testator or the Intestate himself who made it. For these are Privies indeed to the Contract, and as to it represent the Person of the Testator or Intestate himself.

And he agreed, that the Action of Debt against the Executors, for the Arreages of Rent of a Lease which he occupies as Executor, and accrued in their own time, shall be in the Debtor and Detinet; The reason is, although they have the Land as Executor, yet nothing thereof shall be employed to the Execution of the Will, but such Profits which are above that which was to make the Rent, and therefore so much of the Profits as is to make, or answer the Rent, they shall take to their own use to answer the Rent, and therefore they having Quid pro quo, to wit, so much of the Profits for the Rent, the Action ought to be brought against them in such Cases, where they are to be charged in Debts for Rent upon a Lease made to the Testator, and have not the Profits of the Lease it self, nor means, nor default in them to come to it, the Action of Debt ought to be against them in the Detinet only, and this is the Case here, and therefore the Action being in the Debtor and Detinet, doth not lie.

And further he agreed in this Case to the Opinion of Fennor, that the Action here doth not lie for the Successor of the Prebend who made the Lease, for no more than the Successor in this Case shall be bound by the Contract of his Predecessor, no more shall he take advantage by this Contract, for it is the Consideration which makes him to be bound, and not only the Contract, and so the Successor in such Cases is but privy in Law, and not in Deed to the Contract of his Predecessor. But otherwise it is of the Successor of a Bishop and the like, which Leases are not void against the Successor, but voidable.

Case of Armes.

2. **U**pon an Assembly of all the Justices and Barons at Sergeants-Inn, this Term, on Monday the 15th day of April, upon this Question moved by Anderson Chief Justice of the Common Bench: Whether Men may arm themselves to suppress Rebels, Rebellions, or to resist Enemis, and to endeavour themselves to suppress or resist such Disturbers of the Peace, or Quiet of the Realm; and upon good deliberation, it was resolved by them all, that every Justice of Peace, Sheriff, and other Minister, or other Subject of the King, where such accident happen, may do it: And to fortifie this their Resolution, they perused the Statute of 2 E. 3. cap. 3. which enacts that none be so hardy as to come with force, or bring force to any place in Array of the Peace, nor to go or ride armed, night nor day, unless he be

Servant to the King in his presence, and the Ministers of the King in the Execution of his Precepts, or of their Office, and those who are in their company assisting them, or upon Cry made for Weapons to keep the Peace, and this in such places where accidents happen upon the Penalty in the same Statute contained; whereby it appeareth, that upon Cry made for Weapons to keep the Peace, every Man where such Accidents happen for breaking the Peace, may by the Law arm himself against such evil Doers to keep the Peace.

But they take it to be the more discreet way for every one in such a Case to attend and be assistant to the Justices, Sheriffs, or other Ministers of the King in the doing of it.

Rebellion of Subjects High Treason.

3. **A**t the same time it was also resolved by them all (except Walsley, Fennor and Owen) in the Case of one Richard Bradshaw and Robert Burton, who with others lately by word entred themselves into an Agreement one with another to rise and put themselves into Arms, and so to go from one Gentleman's House to another, and so from House to House to pull down Inclosures generally; that this so appearing by their own Confession, or by two Witnesses according to the Statute, is High Treason by the Statute of 13 Eliz. cap. 1. The words of which Statute are, That if any intend to levy War against the Queen, and this maliciously, advisedly and expressly declare or utter by any words or sayings, that this shall be High Treason: For all agreed that Rebellion of Subjects against the Queen hath been always High Treason at the Common Law, for the Statute of 25 E. 3. cap. 1. is, that levying of War within the Realm against the King is Treason, and Rebellion is all the War which a Subject can make against the King.

But Walsley and the others with him said, that the Statute of 1 Mar. cap. 12. 10. That if any so the number of twelve, or more, assemble themselves to the Intent to pull down Inclosures, Pales, and the like with force, and continuing together after Proclamation, according to the Statute, to go away by the space of an hour, or do any of the Offences mentioned in the Statute, that this is Felony: So that if these Actions had been Treason at the Common Law, it had been to no purpose to have made it Felony.

And it seemed to them that the Resistance ought to be with Force to the Queen, before that such Acts shall be said Treason.

But all the other Justices agreed (and so it was put in ure lately in the Case of the Apprentices of London) that if any assemble themselves with Force to alter the Laws, or to set a Price upon Victuals, or to lay violent hands upon the Magistrate, as upon the Mayor of London, and the like, and with Force attempt to put it in Action, that this is Rebellion and Treason at Common Law, and this Statute of 1 Maria, makes it in such a Case but Felony.

And they put a diversity between the Cases of pulling down Inclosures, Pales, &c. comprised in the Statute of 1 Mar. for those are to be understood where divers to the number of twelve, or more, pretending, any or all of them to be injured in particular, as by reason of their common, or other Interest in the Land inclosed, and the like, and assembling to pull it down forcibly, and not to the Cases where they have a general dislike to all manner of Inclosures, and therefore the assembling in a forcible manner, and with Arms to pull them down where they have any Interest, whereby they were in any particular

particular to be annoyed or grieved, is not Treason; but the Case here tending to a generality, makes the Act if it had been executed to be high Treason by the course of the Common Law.

And therefore the intention appearing as the Case is here, it is Treason by the Statute of 13. aforesaid.

Periam in some manner doubted of the principal Case, but to intend to rise with force to alter the Laws, to set Price upon any Victuals, or to use force against a Magistrate for executing his Office of Justice, and the like, he said that they were clearly Treason by the Statute of 13. aforesaid, if it may appear by express words, or otherwise, as the said Statute mentions, for all these tend against the Queen, her Crown and Dignity, and therefore shall be as against the Queen her self: And if it had been put in practice it had been Treason at the Common Law.

Here ends the Lord **P O P H A M ' S**
R E P O R T S.

R 2 A N

C. 1.

THE HISTORY OF THE PROTESTANT

A N
A D D I T I O N

Of certain

Select Cases

In the time of

King JAMES, and King CHARLES the First.

*Trin. 15 Jac. In the King's Bench, entred,
Hill. Jac. Rot. 194.*

Brooks Case.

In an Ejectione firmæ brought by one Brook against Brook, the Case was thus.

John Wright a Copy-holder in Fee, 10 Eliz, surrendred his Land into the hands of the Lord by the hands of Tenants, according to the Custom, &c. without saying, to whose Use the Surrender should be; And at the next Court the said John Wright was admitted Habendum to him and his Wife in Tail, the Remainder to the right Heirs of John Wright, and the Wife of John Wright now Defendant was seised from the time of the Admittance until this day: And it was objected by the Council of the Plaintiff, that the Surrender was void, because no Use was limited, and therefore by Constitution of Law ought to be to the Use of the Surrender, as if a Feoffment be made and no Use limited, it shall be to the Use of the Feoffor, or as it is in Sir Edward Clær's Case, Coke, lib. 6. 18. If a Feoffment be made by one to the Use of his last Will, he hath the Use in the mean time.

Where upon
Surrender of
Copy-hold
Land no Use is
limited, to
whose use it
shall be.

2. That the Admittance was not available to pass an Estate to the Wife, for she was not named in the Premisses, but only in the Habendum, and the Office of an Habendum is to limit the Estate and not the Person, and therefore it is said in Throgmorton and Tracie's Case in Plowd. Com. That if one be named to take an Estate in the Habendum, where he was not named at all in the Premisses, this is not good.

But it was resolved by the whole Court for the first Pointe, that the subsequent Act shall explain the Surrender, for, Quando abest Provisio partis, ad eam provisio legis: And when the Copy-holder accepts a new Admittance, the Law intends that the Surrender generally made was to such an Use, as is specified in the Admittance, and the Lord is only as an Instrument to convey the Estate, and as it were put in trust to make such an Admittance, as he who surrenders would have him to make: And Crook Justice said, Fides adhibita fidem obligat.

For

For the second Point it was also agreed by the Court that the Wife shall take by this Admittance, albeit she were not named in the Premisses, but only in the Habendum; and they agreed, that in Feoffments and Grants, the Party that is not named in the Premisses shall not take by the Habendum: and therefore Throgmorton and Tracy's Case (as to this point) is good Law; But this Case of a Copy-hold is like to the Case of a Will, or to the Case of Frank-marriage, in which it is sufficient to pass an Estate, albeit the Party be only named in the Habendum, and if it should be otherwise the Estates of many Copy-holders would be subverted: And so they resolved that Judgment should be given for the Defendant.

The same Term in the same Court.

Laurking and Wilde's Case.

TH C Rector of the Church of Titches for a riding Nag. libelled in the Spiritual Court, for the Titches of a riding Nag, where the Case was; That a Man let his Land, reserving the running of an Horse at some time, when he had occasion to use him there: The Defendant showed this matter in the Court by his Council, and prayed a Prohibition, and avers, that for the same Land in which the Horse went he paid Tithes. And by the Court, nigh London, a Man will take an 100 or 200 Horses to Carts, now he shall pay Tithes for them, or otherwise the Parson shall be defeated. But in this Case, if the Defendant alledge and prove that it was a Nag for labour, and not for profit, a Prohibition lies.

The same Term in the same Court.

*Havergall *versus* Hare. I. 147.*

Afterwards,
fol. 55.

If an Ejectione sive brought by Havergall against Hare, the Case was thus. A Rent of 20 l. per annum was granted out of Green-Acre to one and his Heirs, to be paid at Michaelmas, and the Annunciation of our Lady, by equal portions, and the Grantor covenants, that if the Rent of 20 l. be arrear by the space of twenty days, that the Grantee may distrain, and that if there be not sufficient Distress upon the Land, or if there be a Rescous Replevin, or Pound-breach, that then it shall be lawful for the Grantee and his Heirs to enter and retain the Land to them and their Heirs, until the 20 l. be paid, 10 l. for one half years Rent was in Arrear, and for it an Entry was made.

Mountague Chief Justice, and Doderidge Justice, there can be no Entry made when 10 l. only is behind, for the words of the Deed are, that if the Rent of 20 l. be behind, that the Grantee and his Heirs may enter, and if he shall enter now he shall retain the Land for ever, for the 20 l. shall never be paid.

Crook and Haughton Justices, contrary, for if 10 l. be Arrear, the Rent of 20 l. is Arrear; for Haughton said, in an Assise of Rent of 40 l. where part is Arrear, yet he ought to bring his Assise for the whole Rent of 40 l. for the Wit ought to agree with the Deed.

Doderidge agreed with him in the Case of an Assise, but not in the principal Point.

And

And for the second Point it was agreed by them all, that upon the Entry
of the Grantee, he shall have a F^a simple determinable, admitting the En-
try for the 10 l. to be good.

The same Term in the same Court, and it is entred,
14 Jac. Rot. 1484.

Robinson *versus* Walter.

Robinson brought an Action of Trover and Conversion against Walter,
and upon the whole matter the Case appeared to be this.

A Stranger took the Horse of the Plaintiff, and sent him to a common Inn,
and there he remained for the space of half a year, at which time the Plaintiff
had notice where his Horse was, and thereupon he demanded him of the Inn-
keeper, who answered that a person unknown left the Horse with him, and said,
that he would not deliver the Horse to the Plaintiff unless he would pay for his
Meat, which came to 3 l. 10 s. for all the time, and also would prove that it
was his Horse, upon which the Plaintiff demurred in Law.

And it was resolved by Mountague Chief Justice, Crook and Dodderidge,
Justices (Haughton Justice dissenting) that the Defendants Plea was good,
for the Inn-keeper was compellable to keep the Horse, and not bound at his
peril to take notice of the owner of the Horse. And by the Custom of Lon-
don, if an Horse be brought to a common Inn, where he hath (as it is com-
monly said) eaten out his Head, it is lawful for the Inn-keeper to sell him,
which Case of the Custom implies this Case. And there is a difference where
the Law compels a Man to do a thing, and where not: As if the Lieutenant
of the Tower brings an Action of Debt for Diet against one who was his
Prisoner, in this Case the Defendant cannot wage his Law, because the
Law compels the Lieutenant to give Vituals to his Prisoner, otherwise
if another Man brings an Action of Debt for Diet, and in the Case at the Bar
the Inn-keeper was compellable. And Dodderidge saith, that if the Law were
as the Plaintiff would have it, it were a pretty trick for one who wants a
keeping for his Horse. And Mich. 6 Jac. in the King's Bench, between
Harlo and Ward, the like was resolved as was cited by Barkesdels of Council
with the Defendant.

An Inn-keep-
er may detain
an Horse until
he be satisfied
for Meat; al-
beit he be left
by a Stranger.

Mich. 14 Jac. In the King's Bench.

Rawlinson *versus* Green.

A Copy-holder surrendered out of Court, according to the custom of the
Mannor, which at the next Court was presented, and Entry thereof
made by the Steward, Scilicet, Comptum est per homagium, &c. but no ad-
mittance: Afterwards Cestuy que use surrenders before Admittance, and the
first Copy-holder surrenders to the Plaintiff: And in this Case there were
two Questions.

1. Whether he may surrender before Admittance?
 2. Who shall have the Land: whether the first Copy-holder, or the Lord?
- Haughton Justice held that he could not surrender before Admittance, and
the

A Surrender of Copy-hold cannot surrender before admittance. the Entry of the Surrender doth not make an Admittance, for this being the sole Act of the Steward, shall not bind the Lord, and it is not like to the usual form of an Admittance, for that is, Dat Domino de fine fecit fidelitatem & admissus est inde tenens. Doderidge Justice agreed and said, that in Hare and Brickley's Case, the Admittance of a Copy-holder was compared to the Induction to a Benefice which gives the Possession.

Hillary, 14 Jac. In the King's Bench.

Sir John Pool's Cafe.

Three Executors brought an Action of Debt, and one only declared, and they were ready for a Tryal in the Country, and now it was moved that the Declaration might be amended, and the names of the other Executors inserted: but per Curiam this cannot be without the Assent of the Parties.

Pasch. 15 Jac. In the King's Bench.

Cooper versus Smith.

Action for these words
Thou hast killed thy Master's Cook.

Innuendo cannot make a thing that is uncertain certain.

Thou hast sacrificed thy Child to the Devil.

An Action upon the Case was brought for these words; viz. Waterman, and thou (Innuendo the Plaintiff) hast killed thy Master's Cook Innuendo, &c. and I will bring thee in question for thy Life: And after Verdict for the Plaintiff, it was moved in Arrest of Judgment by the Council of the Defendant, that the words were not Actionable for the uncertainty, inasmuch as it doth not appear who was his Master, nor that his Master had a Cook.

Mountague Chief Justice said, that the words were Actionable, and albeit all Innuendo cannot make a thing that is uncertain certain, but shall serve as a Predict, yet the words import that he had a Master, and that his Master had a Cook, to which all the Court agreed, and Judgment was given for the Plaintiff.

And another Action was brought for these words, scil. Thou hast sacrificed thy Child to the Devil; and adjudged that the words were Actionable.

Mich. 15 Jac. In the King's Bench.

Lee versus Brown.

Whether Copy-hold Lands may be intailed.

In an Ejectione firmæ brought by Lee against Brown, the Case was this. Tenant in Tail of Copy-hold Land surrendered the same into the hands of the Lord, to the use of J. S. whereupon two Points did arise. 1. Whether Copy-hold Land be within the Statute of *Donis conditionalibus*, so that it may be intailed. 2. Whether the Intail may be cut off by the Surrender.

Doderidge Justice said, as to the first Point, that it hath been a great Doubt, whether it may be intailed, but the common and better Opinion was, that by the same Statute co-operating with the custom it may be intailed, and with this

this agrees Heydon's Case in my Lord Coke's 3d Report, and so was the Opinion of the Court.

And for the second Point, their Opinion also was, that it could not be cut off by Surrender, unless it were by special Custom, and they directed the Jury accordingly: And it was said to maintain this Custom, it ought to be shewn that a Formeon had been brought upon such a Surrender, and Judgment given that it doth not lie; yet it was agreed that it was a strong proof of the Custom, that they to whose use such Surrenders had been made, had enjoyed the Land against the Issues in Tail: And it was said by the Council of the Defendant, that there was a Verdict for them before in the same Case, which they could prove by Witnesses, but the Court would not allow such a Proof, because it was matter of Record, which ought to be shewn forth.

An Intail of
Copy-hold
Land not to be
cut off by Sur-
render, unless
by special Cu-
stom.

In the same Term in the Common Pleas.

May versus Kett.

A ^PAction upon the Case was brought for these words; viz. Thou hast stolen my Corn out of my Barn; And it was moved in Arrest of Judgment, because he had not said how much he had stolen, and perhaps it was of small value: and yet it was adjudged that the Action would lie, for it is at least petit Larceny: But if he had said, that he had stolen his Corn generally, it had not been Actionable, for it might have been growing, and then it had been but a Trespass.

Words.
Thou hast stolen
my Corn out of
my Barn.

The same Term in the Star-Chamber.

Riman versus Bickley, and others.

John Riman exhibited a Bill in the Star-Chamber, against Thomas Bickley, and Anne his Wife, Dr. Thorn, Mr. Goulding, and others Defendants, the said Anne was first married to Devenish Riman the Plaintiffs Son, and between them were many jars and disagreements, and the said Devenish was much given to drinking, and other vices, and divers times did beat and abuse his Wife, and was also jealous of the said Thomas Bickley, and his Wife being at a certain time at Supper with Doctor Thorn, Goulding, and others, spake such words as these (having Communication that her Husband did beat and abuse her) to wit, That she heard that his Father had that quality, and being once whip'd for it, was the better ever after, and that if she thought it would do her Husband any good, she would willingly bestow 40 s. on some body to give him a whipping, whereupon Goulding said, that he would give him a Medecine for his Malady, and within two days after he came in the night in Womans Apparel with a Weapon under his Cloak, and with a Rod, and went into the House and Chamber of the said Devenish, and would have whipped him, and in striving together, there was some hurt done on either side, but Goulding not being able to effect his purpose, fled, and this was conceived to be by the procurement of Anne his Wife: And not long after Devenish fell sick, and sent to his said Wife for certain Necessaries, which she would not send him, and presently after Devenish died, and she refused to come to his Burial.

And although it were much disliked that Devenish shold abuse his Wife in such uncivil manner, as to strike and beat her, and (as Coke late Chief Justice said) it is not lawful by the Act Military for one Man to strike another in the presence of Ladies, yet it was resolved by the whole Court, that it was a great Misdemeanor in the Wife, and uncivil and undutiful Carriage in her to do so to her Husband, as they use to do to Children or Fools, to wit, to give them the Whip, and so to disgrace and take away the good Name of her Husband, which, viz a Man's good Name and his Childrens, are the two things which make a Man live to posterity; as was said by Sir Francis Bacon Lord Baoper: and the Court fined the Wife 500 l. and it was said, that Thomas Bickley her now Husband well deserved to pay this Fine, because he was too familiar with her in the time of his Predecessor, and as the Bishop of London said, Devenish Riman lay upon her hands, and Thomas Bickley upon her heart: and to aggravate this matter, a Letter was shewn which Devenish Riman wrote to his Wife, in which he called her Thoer, and told her somewhat roundly of her faults, and she wrote back to him in the Margin, that he lyed, and wished him to get a better Scribe for his next Letter, for he was a Fool that wrote that, wherein she called him Fool by craft: And Goulding's Offence was accounted the greater, because he was a Minister, so that he was fined 500 l. also: And Coke said, that the course of this Court was that if any were fined who is not able to pay it Respondeat superior, he that is the principal and chief Agent therein must answer it, for otherwise poor Men might be made Instruments of great Mischief, who are not able to answer, and the greater Offenders shall escape, which the Lord Baoper confirmed. And as to Doctor Thorn, he was acquitted by all: And the Bishop of London said, that they had thought to have tread upon a Thorn, and they gat a Thorn in their foot: And by Coke, if Devenish Riman had died upon it, it had been capital in the Wife who procured it, for it was an unlawful Act.

The same Term in the King's Bench.

Wescot *versus* Cotton.

Where an Infant Executor may declare by Attorney, but not defend by Attorney, but by Guardian.

THIS Case was this, An Infant Executor upon an Action brought against him appeared by Attorney, where he ought to appear by Guardian, and it was resolved by the Court that this was Error, for this doth much concern the Infant, in as much as by his false Plea he shall be bound to answer of his own Goods, if he hath no Goods of his Testator, and therefore in 11 C. 4. 1. he hath Remedy against his Guardian for pleading a false Plea.

And by Doderidge, if he hath no Guardian, the Court shall appoint him a Guardian. And if an Infant bring an Action as Executor by Attorney, and hath Judgment to recover, this is not erroneous, because it is for his benefit; so per Curiam, the difference is where he is Plaintiff, and where he is Defendant: And there is another difference where he is Executor, and where not, for being Executor, his Plea might have been more prejudicial to him, and Coke, lib. 5. Russel's Case was agreed for good Law, for an Infant may be Executor, and may take Money for a Debt, and make a Release and give an Acquittance, but not without a true Consideration and Payment of the Money.

The same Term in the same Court.

Thomas Middleton's Case.

Thomas Middleton, alias Strickland was condemned for a Robbery at the Assizes in Oxford, after which he made an Escape, and being taken again he was brought to the Bar, and upon his own Confession that he was the same Party who did the Robbery, and that he was condemned for it, the Court awarded Execution: And Mountague Chief Justice said, that was no new Case, for it had been in Experience in the time of E. 3. and 9 H. 4. and 5 E. 4. that the Court might so do upon his own Confession: And because the Sheriff of Middlesex did not give his Attendance upon the Court in this Case, nor came when he was called, the Court fined him 10 l. And Montague said, that it shall be levied by Proces by the Court, and also all other Fines there assessed and not escheated into the Exchequer, for then the Party might compound for a matter of 20 s. and so the King be deceived.

Where a Felon is condemned, and escaped, and is retaken, upon Confession that he is the same Party, Execution may be awarded.

The Sheriff of Middlesex fined for not attending the Court.

The same Term in the same Court.

Gouldwell's Case.

John Gouldwell seised of Land in Socage Tenure devised them to his Wife for life, the Remainder to John Gouldwell his Son and his Heirs, upon Condition that after the death of his Wife he shall grant a Rent-charge to Steven Gouldwell and his Heirs, and if John Gouldwell die without Heirs of his Body, that the Land shall remain to Stephen Gouldwell in Tail; the Wife dieth, John Gouldwell grants the Rent accordingly, Stephen Gouldwell grants the Rent over: John Gouldwell dies without Heir of his Body, and the second Grantee distraint for the Rent Arrear, and Stephen Gouldwell brings a Replevin: And it was urged by the Council for the Plaintiff that this Rent shall not have Continuance longer than the particular Estate, and cited 11 H. 7. 21. Edrick's Case, that if Tenant in Tail acknowledge a Statute this shall continue but during his life: and Dyer 48. 212. But it was agreed per Curiam that the Grantee was in by the Devilor, and not by the Tenant in Tail, and therefore the Grant may endure for ever.

But for the second Point, this being to him in Remainder, the intent of the Devilor is thereby explained that he shall have the Rent only until the Remainder come in Possession, for now the Rent shall be drowned in the Land by Unity of Possession.

3. It was agreed and resolved, that by the granting of the Rent over this was a Confirmation. And Mountague said, that it was a Confirmation during the Estate Tail, and shall enure as a new Grant afterwards: And Haughton and Doderidge said, that they would not take benefit of the Grant over by way of Confirmation, for as Haughton said, this enures only ought of the Devilor, and he hath power to charge the Land in what manner he pleases, and it is like to an usual Case, as if a Man makes a Feoffment in Fee to the use of one for life, the Remainder over, with power to make Leases, and after he makes a Lease, this is good against Tenant for life, and him in the Remainder also: And I have considered what the intent of the Devilor should be in granting of this Rent, and it seems to me, that in as much as the Land is limited in Tail, and the Rent in Fee, that by this the Grantee shall have power to grant or dispose of the Rent in what manner he would:

but if the Land had been in Fee, I should have construed his intent to have been, that the Grantee should have the Rent only until the Remainder fall; to which Doderidge agreed, who said, that we are in the Case of a Will, and this Construction stands with the intent of the Testator, and stands with the Statute, which says, *Quod voluntas Donatoris est observanda.*

The same Term in the same Court.

Baskerville *versus* Brock.

Difference between Bail in the King's Bench and the Common Pleas. And how a Bail shall relate

A Man became Bail for another upon a Latact in the King's Bench, and before Judgment, the Bail let his Lands for valuable Consideration: And afterwards Judgment was given for the Plaintiff. And now it was debated, whether the Land Leased shall be liable to the Bailment: and it was said by Glanvill of Council with the Lessee, that it ought not to be liable, and he put a difference between a Bailment in this Court, and a Bailment in the Common Pleas, for there the Suit cometh by Original, and the Certainty of the Debt or Demand appeareth in the Declaration, and therefore then it is certainly known from the beginning of the Bailment for what the Bail shall be bound: But in this Court upon the Latact, there is not any certainty until Judgment given, before which the Land is not bound, and now it is in another Man's hands, and therefore not liable, and he put *Hoc's Case*, Co. lib. 5. 70. where it was resolved that where the Plaintiff releaseth to the Bail of the Defendant upon a Suit in the King's Bench, before Judgment, all Actions, Duties and Demands, that this Release shall not bar the Plaintiff, for there is not any certain Duty by the Bail before Judgment, and therefore it cannot be a Release, and he cited the Case of 21 E. 3. 32. upon an Account, and said that it was like to a second Judgment, in that which reduceth all to a certainty, and therefore, &c.

But it was said by Mountague and Crook, that the Lessee shall be bound, for otherwise many Bailments and Judgments shall be defeated, which will bring a great Inconvenience: And Mountague said, that it was like to the Case of a Bargain and Sale of Land, which after it is enrolled, within six Months shall relate to the beginning of the Bargain, so upon the Judgment given, relation is made from the time of the Bailment. But Haughton being contra, therefore Curia advisare vult.

The same Term in the same Court.

The Earl of Shrewsbury's Case.

In the discretion of the Chief Justice to allow a Writ of Error. The Entry of a Judgment how it shall relate.

Upon a Verdict, a Rule was given to have Judgment, and this was upon the Thursday, and upon Saturday after the Party that was Plaintiff died, and it was moved to have a Writ of Error, because it was said, that the Party died before Judgment, in as much as of course after the Verdict, and the Rule given for Judgment, there are four days given to speak in Arrest of Judgment; and so as Yelverton Attorney-General said, he died before Judgment absolutely given: and he moved the Court to have a Supersedeas: And it was agreed that it was in the discretion of the Chief Justice, Ex Officio, to allow a Writ of Error, but because it was a Cause of great consequence, he took the Advice of the Court, and it was agreed that a Writ of Error was a Supersedeas in it self, yet it is good to have a Supersedeas also; and if the Writ of Error had been allowed, the Court could not deny the Party

by a Supersedeas : But because the Writ of Error was not allowed, and also because no Error appeared to the Court, for where Judgment is entered, this shall relate to the time of the Rule given : It was resolved that no Writ of Error should be allowed, nor any Supersedeas granted.

The same Term in the same Court.

Rone's Case.

In an Ejectione summa brought by the Lesse of Rone, Incumbent of the Church of Dallinghoe in Com. Suff. It was found by Special Clergy, that the King was the true Patron, and that Wingfield entered a Caveat, in vita Incurrentis, he then lying in Extremis, scilicet, Caveat Episcopus ne quis admittatur, &c. Nisi Convocatus, the said Wingfield ; the Incumbent dies, Naunton a Stranger presents one Morgan, who is admitted and instituted, afterwards the said Wingfield presents one Glover, who is instituted and inducted, and afterwards the said Rone procured a Presentation from the King, who was instituted and inducted, and then it came in question in the Spiritual Court who had the best Right, and there Sentence was given that the first Institution was Irrita vacua & inanis, by reason of the Caveat, and then the Church being full of the second Incumbent, the King was put out of Possession, and so his Presentation void : But it was adjudged and resolved by all the Court for Rone, for 1. It was resolved that this Caveat was void, because it was in the life of the Incumbent. 2. The Church upon the Institution of Morgan was full against all but the King, and so agreed many times in the Books, and then the Presentation of Glover was void by reason of the Superstitution, and therefore no obstacle in the way to hinder the Presentation of Rone, and therefore Rone had god Right : And if the second Institution be void, the Sentence cannot make it god, for the Spiritual Court ought to take notice of the Common Law, which saith, that Ecclesia est plena & consulta, upon the Institution, and the Parson hath thereby Curam animarum. And as Doderidge Justice said, he hath by it Officium, but Beneficium comes by the Induction : and although by the Spiritual Law the Institution may be disannulled by Sentence, yet as Linwood saith, Alter est in Anglia, who is an Author very well approved of amongst the Civilians : And Doderidge put a Case out of Doctor and Student, the second Book : if a Man devise a sum of Money to be paid to I. S. when he cometh to full Age, and afterwards he sues for it in the Spiritual Court, they ought to take notice of the time of full Age, as it is used by the Common Law, to wit, 21. and not of the time of full Age as it is used amongst them, to wit, 25. So in this Case at the Bar, for when these two Laws met together, the Common Law ought to be preferred : And when the Parson hath Institution, the Arch-deacon ought to give him Induction : And see Dyer 293. Bedingfeld's Case cited by Haughton to accord with this Case.

The same Term in the same Court.

Taylor's Case.

John Taylor a Citizen and Alderman of Gloucester, was put out of his place by the Common Council of the City, for some Misdemeanor, and he sued out a Writ

Writ of Restitution for an Alderman's place.

a Writ of Restitution, and for that the cause of his displacing was not sufficient his Writ was allowed, by reason whereof the other Alderman who was elected in his place was to be removed, for the number of Aldermen was full. But Hazard another Alderman, to the end that the new Elect (who now was Mayor) should not be displaced, was contented to surrender his Place in consideration of 10l. a year granted to him by the Corporation for term of his life, with which the Wife of Hazard was not content, and therefore he would have left his Agreement: and thereupon the question was, whether he might surrender, or not: And it was said by Coventree Hollitox, that he cannot; and he cited Middlecot's Case an Alderman of B. where the Opinion of the Court was, 13 Eliz. that he cannot surrender: Doderidge, perhaps they would not except his Surrender: Mountague said, that Alderman Martin of London gave up his Alderman's place, and without question any Man in such a Case may surrender or leave his place, to which the Court agreed, and therefore it was ordered that Hazard shall have his 10l. a year, and that he shall stand to his first Agreement.

The same Term in the same Court.

May and Samuel's Case.

Arbitrement.

An Action of Debt was brought upon an Obligation, the Condition whereof was to stand to the Arbitrement of John S. concerning all matters between them to the time of the Submission, who arbitrates that the one shall pay 20s. and that the other shall make a general Release to him of all matters, from the beginning of the World to the time of the Arbitrement.

Haughton Justice, this is an Arbitrement but of one part, and therefore void, but if it had been only that the one shall pay 20s. it may be good, for it shall be intended that the other by reasonable Construction shall be discharged or acquitted, to which Crook and Doderidge Justices agreed. But by Mountague Chief Justice, it ought to be specified; yet they all agreed, and so it was adjudged that this was a void Arbitrement, for it was of the one part only, to wit, that he shall pay 20s. for the other part for the Release to the time of the Arbitrement was not within the Submission; so if the Arbitrement had been, that the one shall make a Release, or shall be discharged or acquitted without speaking of the other, this being on the one part only is a void Arbitrement, vide Coke, lib. 8. Baspole's Case, and 7 H. 6. 40. accordingly.

The same Term in the same Court.

Vaughan's Case.

Tomas Dedham had to Apprentice one Holland, who got his Maid with Child, and afterwards departed from his Master's Service, and staid a whole night with Vaughan his Kinsman, and Dedham procured a Warrant from Sir Stephen Soame a Justice of Peace, that the Constable should bring the said Apprentice to order according to Law, and because that Vaughan persuaded him to withdraw himself, so that he should not be taken by virtue of the Warrant, he was indicted.

And it was agreed that it was lawful for Vaughan to lodge and relieve him, albeit he knew his mis-deeds, they being no Treason or Felony: But Haughton

Haughton Justice took exception to the Indictment, because no place appeared where he perswaded him to withdraw himself from the Warrant, or in truth that he did hide himself from the Warrant, for if he did not so, the perswasion was nothing.

And Doderidge took another exception to the Warrant, because the Statute saith that two Justices, of which one of them shall be of the Quorum, shall proceed in such Cases against the Malefactor, and that they shall compel the Party to allow means for the Education of the Infant, or otherwise the Defendant shall suffer Corporal Punishment, and so this Warrant not being special according.

Pasch. 16 Jac. In the Star-Chamber.

cc
Wrennum's Case.

SIR Henry Yelverton Attorney-general, exhibited an Information in the Star-Chamber, against one Wrennum, Ore tenus, because he had divers times petitioned the King against Sir Francis Bacon Lord Chancellor, pretending that the said Lord Bacon had done great Injustice to him, in granting an Injunction, and awarding Possession of Land against him, for which he had two Decrees in the time of the former Chancellor: And also he made a Book of all the Proceedings in the said Cause between him and one Fisher, and dedicated and delivered it to the King, in which he notoriously traduceth and scandalizeth the said Chancellor, saying, that for his unjust Decree, he, his Wife and Children were murdered, and by the worst kind of death, by Starving: And that now he having done unjustly, he must maintain it by speaking Untruths, and that he must use his Authority, Wit, Art and Eloquence, for the better maintenance thereof, with other such like scandalous words: And the Attorney cited a President, 2 Jac. where one Ford for an Offence in the like manner against the late Chancellor was censured in this Court, that he should be perpetually imprisoned, and pay the Fine of 1000l. and that he should ride upon an Horse with his Face to the Tail, from the Fleet to Westminster, with his Fault written upon his Head, and that he should acknowledge his Offence in all the Courts at Westminster, and that he should stand there a reasonable time upon the Pillory, and that one of his Ears should be cut off, and from thence should be carried to Prison again, and in the like manner should go to Cheapside, and should have his other Ear cut off, &c. And because they conceived that the said Wrennum had wronged the said Lord Chancellor in the said Suggestion, they all agreed in his Censure according to the said President: See for such matter, 19 Ass. 5. 9 H. 8. Sir Rowland Heyward's Case, and 21 H. 8. Cardinal Wolsey's Case.

The same Term in the King's Bench.

Mingie's Case.

A Writ of Annuity was brought by Mingy, which was granted, pro Consil. impenso, & impendendo, the Defendant pleaded in Bar that he carried a Bill to the Plaintiff, to have him set his Hand to it, and because he refused he detained the said Annuity: And per Curiam this is no Plea, for he is

is bound to give Advice, but not to set his Hand to every Will, for this may be inconvenient to him.

The same Term in the same Court.

THE Case was this, A Lessee for years was bound in a Bond to give up the Possession of the Land demised to the Lessor, or his Assigns, at the end of the Term, the Lessor aligns over his Interest, and the Assignee requires the Lessee to perform the Condition, who answers, that he knew not whether he were the Assignee, and thereupon refuseth: And the question was, whether he had broken the Condition, and it was adjudged that he had, for he hath taken upon him so to do, and it is not like a Condition annexed to an Estate, as Coke, lib. 5. Mallorie's Case, or Coke, lib. 6. Green's Case, where the Patron presented his Clerk to a Deprivation, yet the Ordinary ought to give the Patron notice of the Deprivation; for it is a thing Spiritual, of which a Layman shall not be bound to take notice.

Deodand.

It was moved, that a Man riding upon an Horse through the Water was drowned, and by the Coroners Inquest it was found that his death was caused Per cursum aquæ, and the Horse was not found a Deodand, and per Curiam they did well, for the Water, and not the Horse was the cause of his death.

The same Term in the same Court.

Wooton *versus* Bye.

THE Case was this: A Man made a Lease for years, rendering Rent, and upon Payment of the Rent the Lessor made an Acquittance, by a Release of all Actions, Duties and Demands, from the beginning of the World to the day of the date: And whether the Rent to come were released by it, was the question: And it was moved by Crook at the Bar, that it was not, for a Covenant in future shall not be released by such words, yet a Release of all Covenants will be good in such a Case, as the Book is in Dyer 57. so Hoe's Case, Coke, lib. 5. 70. b. such a Release will not discharge a Bail before Judgment. But it was answered and resolved by the Court, that such a Release will discharge the Rent to come, for this word (demand) is the most large and ample word in a Release that may be, as Littleton saith, and in Coke, lib. 8. Altham's Case, and in Hoe's Case, Coke, lib. 5. one was Bail for the Defendant, the words whereof are conditional, Scil. Si contigerit predict. defendant. debita&c dama illa prefat. Quer. minime solvere, &c. So that before Judgment it is altogether uncertain, and therefore cannot be released, but in the Case at the Bar he hath Jus ad rem, though not in re, as Crook Justice said.

The same Term in the same Court.

Bret *versus* Cumberland.

IN a Writ of Covenant the Case was thus: Queen Elizabeth by her Letters Patents made a Lease of certain Mills, rendering Rent, in which Lease were

were these words, to wit, That the said Lessee his Executors, Administrators and Assigns, should from time to time repair the Mills, and so leave them at the end of the Term, the Lessee assigns over his Term, the Queen also grants over the Reversion, the first Lessee dies, and the Grantee of the Reversion brings a Writ of Covenant against his Executors; In which Case there were two Points.

1. Whether these words, And the said Lessee, his Executors, Administrators and Assigns, shall from time to time, &c. make a Covenant, or no. 2. Whether (as this Case is) it will lie against the Executors of the Lessee.

As to the first Point it was agreed that it is a Covenant, for being by Indenture it is the words of both Parties, and it is more strong being in the Case of the Queen.

Haughton said, that 25 H. 8. Tit. Covenant. Covenant will lie against a Lessee after Assignment, but Debt lieth not for Rent after the Lessee hath accepted the Assignee for his Tenant, and therefore it seems that by the express words of the Covenant that the Action lies.

Doderidge Justice contra, for between the Queen and the Lessee there is privity of Contract, and also of Estate, so that the Queen, her Heirs and Successors might have had an Action against the Lessee or his Executors, upon the privity of Contract; and where the Lessee assigns over, the Privity of Contract remains, but the Privity of Estate is gone to the Assignee, and now when the Queen grants over the Reversion, the Privity of Contract is utterly determined, whereby the Action of Covenant cannot be maintained against the first Lessee, or his Executors, who are more remote: to which Mountague Chief Justice agreed, see 2 H. 4. 6. 6.H. 4.1. and Co. lib. 3. Walker's Case, and the Judgments there cited, Et adjournatur.

The same Term in the same Court.

Bennet *versus* Westbeck.

THIS Case was thus: Tenant for life, Remainder for life, Reversion in Fee, he in Remainder for life gives his Deed of Demise (with the Assent of the first Tenant for life) upon the Land to a Stranger in the absence of the Lessor, and said, that he surrendered to him in Reversion: And it was said, that this Surrender being without Deed was not good to him who was absent, and to confirm it, the Case was put out of 27 H. 8. Where Mountague Chief Justice laid, that if a Feoffment be made to four, and Livery is made to one in the absence of the other, but in name of all, if it be by Deed this shall enure to all; but if it be without Deed, then only to him to whom the Livery was made: So here this Surrender doth not enure to him in the Reversion, being absent.

But Non allocatur, for the sole Point now in question, was, whether he in Remainder for life can surrender without Deed, and as to it this Rule was taken; viz. That that which cannot commence without Deed, cannot be granted without Deed, as a Rent, Reversion, Common, Advowson, &c. as 19 H. 6. 33. 14 H. 7. 3. 1 & 2 Phil. & Mar. 110. 22. Ass. Pl. 16. But in this Case this took effect by Livery and not by Deed, and therefore might be determined without Deed.

Mountague and Haughton agreed that it might be surrendered without Deed, because it had its beginning without Deed, but it could not be granted over without Deed.

Doderidge Justice said, that it could not be surrendered without Deed, but he said, that Tenant in Possession may, or Tenant for life and he in Remainder together may surrender to him in the Reversion, but this shall enure as two several Surrenders: first of him in Remainder to the Tenant for life, and then by the Tenant for life to him in the Reversion.

Crook Justice agreed with Doderidge, for the Estate of him in Possession is an *Esstoppel* to the Surrender, so that it could not be surrendered without Deed.

The same Term in the same Court.

Thurman *versus* Cooper.

In an Ejectione cause brought by John Thurman against William Cooper, upon the whole matter the Case was thus: Lands were given to a Man and Woman (who afterwards inter-marry) and to their Heirs and Assigns, *Habendum* to them and to the Heirs of their two Bodies engendred, the Remainder to them and the Survivor of them, with Warranty to them and their Heirs and Assigns for ever. And the Question was what Estate this shall be: whether an *Estate-tail* or *Fee-simple*: or a *Fee-tail* with a *Fee-simple expectant*? And it was said that this shall be an *Estate-tail* only, for the *Habendum* qualifies the general words precedent, and with this agrees Perkins 35. b. and Coke, lib. 8. 154. b. Altham's Case: But it was answered and resolved by the whole Court, that this is a *Fee-tail* with a *Fee-simple expectant*; and they observed these Rules.

1. That every Deed shall be taken most strong against him that made it.
2. That every Deed shall be construed according to the intent of the Maker, so that all the parts may be effectual if they can stand together with the Rules of Law, 40 E. 3. 5. Percy saith, that it is a *Fee-simple*, 21 H. 6. 7. that it is an *Estate-tail* with a *Fee-simple expectant*, Dyer 160. and Plowd. Paramore and Yardley's Case, the Law shall make an Order of words where there is no Order put by the Parties; and the words after the Remainder limited, are *Tenendum de Capitalibus Dominis feodi, &c.* and therefore it ought to be a *Fee-simple*, for if it were a *Fee-tail*, he should hold of the Donor, as it is in Coke, lib. 6. Sir John Molin's Case, and other Books: and although the Warranty cannot enlarge an *Estate*, yet this expresses his intent to pass a *Fee-simple*, and the Law shall make a Construction that the *Fee-tail* shall precede, upon which the *Fee-simple* shall be *expectant*, according to that which is before laid, in Paramore and Yardley's Case.

Doderidge, If the *Habendum* had been to a Stranger, the Premises had been but a Tail, as 7 H. 4. for otherwise the *Habendum* shall be void: But if Land be given to one and his Heirs (viz. in Tail) or if the said Donee die without Issue of his Body, this had been but an *Estate-tail* only, because it immediately checks and confirms the Premises, to which Haughton agreed, Et adjournatur.

The same Term in the same Court.

Powel's Case.

POWEL an utter Barrister of the Temple, and also Town-Clark of Plymouth, brought an Action upon the Case against [redacted] for these words; The Defendant supposing that the Plaintiff had wronged him in the Court of Plymouth, said, that he was a Puritan Knave, a precise Knave, a bribing Knave, a corrupted Knave, and that he would make him answer for that which he had done in another place: And after Verdict for the Plaintiff, it was now moved, in Arrest of Judgment that the words were not Actionable, because he doth not scandalize him in his Profession by which he acquires his Living.

Words,
That he was a
Puritan Knave,
a precise Knave,
a bribing
Knave, a cor-
rupted Knave,
&c.

And Mountague Chief Justice said, that this word Bribing doth not import that he took a Bribe, and therefore this word and all other words, but (corrupted Knave) are idle, but these words impeacheth him in his Office, for it hath reference to that, and therefore is Actionable, and Judgment was given accordingly.

The same Term in the same Court.

sir Baptist Hickes's Case in the Star-Chamber.

SI R Baptist Hickes having done divers pious and charitable Acts, to wit, had founded at Camden in Gloucestershire an Hospital for twelve poor, and impotent Men and Women, and had made in the same Town a new Well tunable to others, a new Pulpit, and adored it with a Cushion and Cloth, and had bestowed Cost on the Sessions House in Middlesex, &c. one Austin Garret a Copy-holder of his Manor of Camden, out of private Malice, had framed and writ a malicious and invective Letter to him, in which in an ironical and deriding manner he said, that the said Sir Baptist had done those charitable Works, as the proud Pharisee, for Main-glory and Ostentation, and to have popular Applause, and further in opprobrious manner taxed him with divers other unlawful Acts: And it was resolved by the Court that for such private Letters an Action upon the Case doth not lie at Common Law, for he cannot prove his Case, to wit, the publishing of it; but because it tends to the breach of the Peace it is punishable in this Court, and the rather in this Case, because it tends to a publick Wrong, for if it should be unpunished, it would not only deter and discourage Sir Baptist from doing such good Acts, but other Men also who are well disposed in such Cases; and therefore (as the Arch-Bishop observed) this was a Wrong, 1. To Piety, in respect of the Cost bestowed on the Church. 2. To Charity, in regard of the Hospital. 3. To Justice, in consideration of the Sessions House; and these things were the more commendable in Sir Baptist, because he did them in his life time: For as Mountague Chief Justice observed, they who do such Acts by their Will, do shew that they have no Will to do them, for they cannot keep their Gods any longer. And he only took a Diversity where such a Letter concerns publick matter as they did, or private in which Case it is not punishable.

Where a pri-
vate Letter is
punishable as a
Libel.

But the Lord Coke said, that it was the Opinion of the Judges in the Lord Treasurer's Case, when he was Attorney, that such a private Letter was punishable in this Court, and thereupon he had Instructions to exhibit an Information,

mation, but the Lord Treasurer Jaccons in extremis was content to pardon him; and so it was resolved between Wooton and Edwards: And Sir Francis Bacon Lord Chancelloz said, that the reason why such a private Letter shall be punished, is, because that it in a manner enforceth the Party to whom the Letter is directed to publish it by his Friends to have their Advice, and for fear that the other Party would publish it, so that this Compulsory Publication shall be deemed a Publication in the Delinquent; and in this Case the Party was fined at 500l.

The same Term in the same Court.

Bernard *versus* Beale.

Words,
That the Plain-
tiff had two
bastards 36
years since.

An Action upon the Case was brought for these words; viz. That the Plaintiff had two Bastards 36 years ago, upon the report whereof he was in danger to have been divorced: And it was resolved that for Defamation there was no Remedy but in the Spiritual Court, if he had no temporal Loss thereby, and therefore it is not sufficient to ground an Action to say, that he was in danger to be divorced, but that he was De facto, divorced, or that he was to have a Presentment in Marriage, as it is in Anne Davies Case, Coke, lib. 4.

The same Term in the same Court.

Brabin and Tradum's Case.

A Prohibition
for a Seat in
the Church.

The Case was, That the Church-Wardens of D. had used time out of mind to dispose and order all the Seats of the Church, whereupon they disposed of a Seat to one, and the Ordinary granted the same Seat to another and his Heirs, and excommunicated all others, who afterwards should sit in the Seat, and a Prohibition was prayed and granted, for this Grant of a Seat to one and his Heirs is not good, for the Seat doth not belong to the Person, but to the House, for otherwise when the Person goes out of the Town to dwell in another place, yet he shall retain the Seat, which is no reason, and also it is no reason to excommunicate all others that should sit there, for such great Punishments should not be imposed upon such small Offenders, an Excommunication being *Traditio Diabolica*.

The same Term in the same Court.

Fulcher *versus* Griffin.

A Parson co-
venant that his
Parishioners
shall pay no
Tithes.

The Parson of D. covenanted with one of his Parishioners that he should pay no Tithes, for which the Parishioner covenanted to pay to the Parson an Annual Sum of Money, and afterwards the Tithes not being paid, the Parson sued him in the Court Christian, and the other prayed a Prohibition: And it was agreed that if no Interest of Tithes pass, but a bare Covenant, then the Party who is sued for the Tithes hath no Remedy but a *Writ of Covenant*: And the better Opinion of the Court in this Case was, that this was a bare Covenant, and that no Interest in the Tithes pass.

The

The Custody of a Copy-holder that was a Lunatick, was committed to I. S. Darcie's Case
and for Trespass done upon his Land, it was demanded of the Court in whose
name J. S. should bring the Action, and their Opinion was, that it should be
in the name of the Lunatick.

Trin. 15 Jac. In the King's Bench.

The Earl of Northumberland's Case.

THE Earl of Northumberland being seised of the Manor of Thistleworth, in which he had a Let to be holden twice a year, to wit, within a month after Easter, and a month after Michaelmas, and Henry Devell being a Freeholder of the said Manor erected a new Dove-coat at Heston within the Precinct of the said Let, which was presented at the Let for a common Pulence, for which Devell was amerced 40 s. and was commanded to remove it upon pain of 10 l. for the which a Distress was taken by Henry Sanders and others, as Bailiffs to the said Earl, whereupon Devell brought a Replevin, and they made Avowry and justified as Bailiffs, and prescribed that they used to make By-laws to rebells common Pulence, and also prescribed in the Distress. And the Point in question was, whether the new erecting of a Dove-coat by a Freeholder were a common Pulence, and punishable in the Let : And it was resolved by the whole Court upon great deliberation, viz. Mountague Chief Justice, Crook, Doderidge and Haughton Justices, that it was not a common Pulence, either punishable or inquirable in a Let ; and by Haughton a Man hath Jus proprietatis & privilegii in the Doves. 1. Propriety in respect of the place, as 22 H. 6. 39. Trespass lies for taking a Goshawk in respect of the place, as 3 H. 6. 55. For Hares, and Spencer's Case in Dyer, and so of other things which are Fera Nature. And if a Deer goes out of a Park, albeit it be in the King's Case, yet it is lawful for the Owner of the Soil to take it, if it be in the place where the Deer hath Chase and Rehale : And by the Register of Fitzherbert it appears that Trespass lies Quare columbare frexit, & Columbas cepit : But 16 E. 4. 7. Trespass doth not lie for killing of Doves, but there is a Quare of an Action upon the Case, and because the Doves do no Trespass, neither is there any Remedy for the killing of them, therefore they are no common Pulence ; for by Brook, 34 H. 6. Brook's Action upon the Case, the common Custom is the Common Law, and there is no Authority against it, but Coke, lib. 5. 104. Boulston's Case which is only on the bye, and is not agreeing with the Reason of the Principal, and this confirms my Opinion, Quod sicut concessum per totam Curiam, for there the principal Case was that a Man made Cony burrows, and the Conies strayed into his Neighbour's Grounds, and adjudged that it was not Actionable ; but it was lawful for any Man to kill them upon his own Ground ; so here, &c.

Doderidge, It may be an Hurt to the Commonwealth, but not a publick Pulence, for that ought to be immediate or general.

1. Immediate it cannot be, for the erecting of a Dove-coat cannot in it self be a Pulence.

2. It is not general but particular to the Neighbouring Inhabitants : And it hath been allowed of all sides, that a Man may have a Dove-coat by Prescription, which could not be if it were a Pulence ; to which Mountague agreed : And it is lawful for any Man to kill the Doves upon his own Land, but they must beware that they do it not against any Statute, for Doves are preserved by many Statutes, as by the Statute of Wales, made in the time of E. I. and the Statute of 18 E. 2, gives Directions that the killing of Doves shall be

Whether the
erecting of a
Dove-coat be
common Nu-
lance.

be presented at the Læt : And the Statute of 18 Eliz. ordains that Doves shall not be shot.

3. However the Replevin lies for a fault in the pleading, for the harm and nuisance which the Doves do is laid to be Per totam patriam, whereas it ought to be within the Precinct of the Læt ; to which Mountague agreed.

Crook, a Man hath Property in the Doves only by the Possession, for being at large, they are Nullius in bonis, and when they are in his Possession, to wit, in the Dove-coat, they do no harm to any : and it was lately ruled in this Court, that a Man cannot lay Logs in the King's High-way, although there be sufficient Room for Passengers, because it is a Wrong to have the High-way straitned ; so here a Prescription should not be good if it were a Nuisance, for it is all one to erect a great Dove-coat, or a little one, for a Nuisance Non recipit magis aut minus : And Bolton's Case rather confirms than increaseth my doubt, and so I agree with my Brethren.

Mountague, a Man hath Jus Duplex in Doves. 1. Jus proprietatis. 2. Jus privilegii, for they fly to and again, and (as Bracton saith) have Animum revertendi, and so have not other things which are Ferox nature : And it is a good Argument that this matter was never questioned, for it is without Question. Littleton saith in the Case of Disparagement, 21 E. 3. 4. They of the Læt ought to enquire of such things as have been enquirable, yet the excess thereof is restrainable by the Justices of Assize.

A Precepe lies of a Dove-coat, as appears by the Verse, Mich. Col. and Dower and Partition lies thereof, which shews it to be lawful, and by the Book of 17 E. 4. 7. It seems that it is not lawful to take Doves : And as a Man cannot prescribe to do a Nuisance, so the King cannot licence one to do it : And therefore I agree that Judgment shall be given for the Dove-coat.

Excess of
Dove-Coats
restrainable by
the Justices of
Assize.

The same Term in the same Court.

*Richardson *versus* Cabell.*

Where Tithes
shall be paid
for Gras of
Guest Horses.

Richardson, being a Parson, libelled against Cabell in the Spiritual Court for Tithes, because the said Cabell being an Inn-keeper, took all the benefit of his Pasture by putting in Guest Horses into his Pasture, whereupon Cabell prayed a Prohibition, and it was not granted, for it is Titheable in this Case : But if Cabell had taken a Crop of Hay, and afterwards he had put Guest Horses into the Pasture, in that Case it had not been Titheable, for he had his Tithe before, and thereby it should seem that some Crop is not Titheable.

The

The same Term in the same Court.

Southern *versus* How.

Ralph Southern Plaintiff in an Action upon the Case against Robert How, shews for his Case, That the Defendant being a Goldsmith in London, and having counterfeit Jewels, knowing them to be counterfeit, sent William Saldock his Servant with them to the Plaintiff, being a Merchant in Barbary, to use him for the Sale of the Jewels to the King of Barbary, and the Plaintiff thereupon sold them to the King of Barbary for 800l. and Saldock having received the said Money, went from thence; And the Jewels being afterwards discovered to be counterfeit, the Plaintiff was taken and enforced by Imprisonment to make Restitution of the Money to the said King. But it was laid by the Court, that the Verdict did not prove the Case, for it was found that the Defendant did not command his Servant to make use of the Plaintiff, nor to sell to the King, but generally to any: And that the Jewels were of some worth, scil. 80l. And it was agreed at the Bar, by Davenport, that in this Case the Action well lies, for the Master shall answer for his Servant, Dyer 151. the Lord North's Case, 5 E. 4. i. the Sheriff shall be amerced for the ill Return of his Waiiff: And if I command my Servant to kill one, who commands another, in this Case his Master shall not be punished, but in Trespass all are Principals, and 2 H. 4. 18. If a Servant burns his Master's House, whereby another House is burnt, there the Master shall answer for it, for 14 H. 8. 31. b. an Action upon the Case lies where there is no other Action provided for such a thing, so that an Action well lies in this Case, and see Doctor and Student 137. in what Case the Master shall answer for his Servant.

Coventry Solicitor, to the contrary, for it was lawful for the Plaintiff to command his Servant to sell them, for it was found by the Verdict that the Jewels were of some worth and value, and he did not command him to sell them for more than they were worth, and 9 H. 6. 53. b. If the Master send his Servant into a Fair, or Market, to merchandize for him, the Master shall not be punished for his fault. And in this Case the Command was not to deal with the Plaintiff, or to sell to any one in particular, and for it see 9 H. 6. aforesaid: and if the Servant will exceed the lawful Command of his Master, the Master shall not be punished therefore, but if the Command be unlawful it is otherwise. 11 E. 4. 6. A Man sells Cloth of such a length, which proves to be short of the length, an Action lies not without a Warranty, so Fitz. N. B. 64. c. For Wine if it be warranted to be good, an Action lies if it be corrupt. If my Beasts go into another Man's Soil, an Action lies against me, but if my Servant drive my Beast into another Man's Soil, I shall not be punished, for he doth this of his own wrong, without any such Warrant from me, 13 H. 7. b. And if when a Man sell a thing for more than it is worth, an Action would lie for it, we should never have an end of Actions. And the Action doth not lie for another reason, because it doth not appear that the King of Barbary did lawfully imprison the Plaintiff, 26 H. 8. 3. If a Man makes a Lease, and covenants that he shall not be disturbed, if a Stranger disturb him, an Action lieth not against a Covenantor, so here, &c. for it seems it was Ex regali potestate, and not in a lawful manner, and so he concluded that the Action will not lie, and so it was resolved by the whole Court.

Where a Master shall be answerable for his Servant, and where not.

Mountague Chief Justice, the Plaintiff is no Party who shall have the Action but the King of Barbary. 2. The Verdict is contrary to the Declaration, and Jewels are in value according to the Estimation, and therefore 38 Eliz. between Simson and Sanders in the Star-chamber, it was resolved that a Man shall not be punished for Perjury upon the Valuation of Jewels.

Doderidge said, that 22 Eliz. an Action upon the Case was brought in the Common Pleas by a Clothier, that whereas he had gained great Reputation for his making of his Cloth, by reason whereof he had great Utterance to his great benefit and profit, and that he used to set his Mark to his Cloth, whereby it should be known to be his Cloth: And another Clothier perceiving it, used the same Mark to his ill-made Cloth on purpose to deceive him, and it was resolved that the Action did well lie.

The same Term in the same Court.

A Certiorari
granted into
Wales.

Upon an Indictment of Barretry before the Justices of Wales, a Certiorari was moved for to remove it into this Court: And it was said at the Bar that it had not been seen from the time of E. I. that such a Writ had been granted in the like Case, and therefore he collected, that it ought not to be granted: But it was resolved by the Court, that a Certiorari should be granted, in regard it is in the King's Case, and by Haughton Justice, notwithstanding the Statute Quod communia placita non sequantur Curiam nostram yet it is plain that the King may sue in what Court he will: And albeit this Writ in such a Case ought not to be granted in Case of a common Person, yet that is no reason but that it may be granted in the Case of the King.

The same Term in the same Court.

Sir Henry Glemham's Case.

A Plea not to
be amended in
another Term,
without Assent
of Parties.

In a Quo warranto against Sir Henry Glemham for using certain Liberties, to which Sir Henry pleaded in Bar, and the King's Attorney replied, and so this matter rested three years, and then the King's Attorney put in a new Replication, and joyned Issue upon other Points: and it was moved for the Defendant that he might put in a new Bar, in regard the Replication is altered, and nothing was entered, but all remained in Paper: And it was agreed by the Court that the King shall not be concluded but that he might put in his Replication at any time; And that the King cannot make a double Plea, for the other Party shall answer first to one, and then to the other: And the Court would not allow Sir Henry to make a new Bar in this Case, without the Assent of the Attorney, who would by no means agree to it: And in Case of a common Person, this shall not be allowed without the Assent of Parties.

In the same Term in the same Court.

Lamb and
Wooll includ-
ed in small
Tithes.

In an Action of Trover and Conversion between one Nicholas Lamb and William Ward, it was agreed that Tithe-Lamb and Wooll was included within small Tithes: And Mountague said, that a Vicaridge endowed might be appropriated but not to the Parson, to which Haughton and Doderidge agreed, 31 H. 6. Fitz. tit. Indicavit, is that such a Vicaridge may be dissolved:

solved: An Appropriation may be by the King sole where he is Patron, but there is no Book that it might be by the Patron sole. Grindon's Case in Plowden, and 17 E. 3. 39. An Appropriation cannot be without the King's Licence.

The same Term in the same Court.

Blaxton *versus* Heath.

In an Action of Debt by Blaxton against Heath, the Case was this. A Man possessed of a Term for twenty years, in Right of his Wife, made a Lease for ten years, rendering Rent to him, his Executors and Assigns, and died. And the Question was whether the Wife shall have the Rent after his death, or his Executors; and it was argued, that the Wife should not have it, because she was in by a Title Paramount; as if there be two Joyn-Tenants for life, the one makes a Lease for years rendering Rent, and dies, the other shall not have the Rent, Dyer 167. and so of Joyn-Tenants in Fee, Coke, lib. 1. 96. and Perkins accordingly: To which Mountague Chief Justice agreed, for he said, it was but an Errat of ten out of twenty, the Remainder continuing as before: And Redditus is Reventus, a turning again, but it is otherwise of a Condition, which is a new Creature, of which the Wife shall take no advantage.

Crook Justice, this is a special Reservation, and therefore the Executors shall have it, and not the Wife, for she comes in Paramount, as in the Case of Joyn-Tenants: Haughton agreed thereunto, and said, that the Rent shall be incident to him who hath the Reversion under the Lessee, who is the Executor: And Mountague demanded of Hobert Chief Justice of the Common Pleas, his Opinion in this Case, who agreed that the Wife should not have it.

The same Term in the same Court.

Dennis *versus* Sir Arthur Mannaring, and others.

In the great Case between Gabriel Dennis Plaintiff, in Trespass against Sir Arthur Mannaring and Brimblecomb, and others, the Verdict was found for the Defendants: And now it was moved in Arrest of Judgment for the Plaintiff, because no Bail was entered for Brimblecomb one of the Defendants, given in B. R. for every Defendant is supposed in Custodia Marescalli, and in this Case the Bail entered, Venire facias is awarded to try the Issue between the Plaintiff and Defendants, where one of the Defendants is no Party in Court: And Serjeant More put the Case of the Lord Chandos and Sculler, and other Defendants, where the Judgment in such a Case was resolved to be erroneous.

Mountague, We ought Discernere per legem quid sit justum, and here Brimblecomb being no Party in Court, no Verdict could be given.

Doderidge, I have seen in this Court, where upon a Writ of Error brought in such a Case, we have compelled him to put in his Bail, because he should

A not

not take advantage of his own wrong and folly : But because that here no fraud appeared to be in the Plaintiff, he shall not be bound to stand to the Verdict : Haughton agreed, but Crook seemed to the contrary : But it was agreed, that if Brimblecomb had appeared at the Suit of any other, the same Term, it had been sufficient : And these Books were cited to be in the Point, 32 H. 6. 2. 8 E. 4. 5. 21 H. 6. 10.

*The same Term in the same Court.*Hide *versus* Whistler.

Exception of all Wood, Under-wood, Coppices and Hedge-rows.

A Coppice, what it is.

William Hide made a Lease for years of certain Lands to Whistler, excepting to the Lessor all his Wood and Under-wood, Coppices and Hedge-rows ; and in a Replevin the question was, whether the Soil shall pass thereby ; for the Lessee put his Beasts into a Coppice, and the Lessor distrained them, whereupon, &c. And the words of the Exception were further, standing, growing, and being in and upon the Premises : And the Lessee covenanted to make Fences, but if the Lessor made new Coppices, that the Lessee should not make Fences about them. And it was laid, that a Coppice signifies a parcel of Land fenced for the safegard of young Trees. And it was laid for the Plaintiff, that Premises are Pre dictissa, and by these words, growing, and being in the Premises, it shall be intended that the Soil did not pass, for it is pre-demised : But it was resolved, that the Soil it self was excepted by the Exception of the Wood and Coppice, 14 H. 8. 1. The Bishop of London's Case, Coke, lib. 5. Ives's Case, and lib. 11. Lyford's Case : And by the reserving of a Coppice the Soil it self is reserved ; for by Mountague, that which is reserved is not demised, and so the Distress well taken. Crook agreed, and he said the difference was good between Wood and Trees, for by the excepting of Wood, the Soil it self is excepted, otherwise of Trees : Haughton agreed that the Soil it self is excepted in this Case, and so it was adjudged.

*The same Term in the same Court.*Talbot *versus* Sir Walter Lacen.

Covenant to leave the Premises in Reparations at the end of the Term.

In a Writ of Covenant brought by Margaret Talbot against Sir Walter Lacen, upon a Lease made by the Plaintiff to the Defendant, of a Park, &c. for five years, if she should live so long, in which the Lessee covenants for him, his Executors and Assigns, to keep the Premises in good Reparations, and so to leave them at the end of the Term, and also to deliver to the Plaintiff (upon notice given) four Bucks, and four Does in season, during the life of the Plaintiff, in every of the said years : And after the expiration of the aforesaid Term of five years she brought a Writ of Covenant, and assigned the Breach, because that in the end of the Term he committed Waste, and because that after the end of the Term the Defendant refused to deliver the Deer ; And albeit the words of the delivery of the Deer are, during the life of the Plaintiff, yet they are also every of the aforesaid years, and therefore it was resolved that he shall not have them during her life in this Case.

And

And for the other Point it was objected, that in Fine termini, was uncertain, for it may extend after the Term, but Ad finem termini had been sufficient, Old Book of Entries, 169. for when he covenants that at the end of the Term, he would leave the Premises in Reparations, and Ad finem termini, he did waste, this ought of necessity to be intended a Breach of the Covenant, and therefore it was adjudged that the Action of Covenant well lies.

Mich. 16 Jac. In the King's Bench.

Havergall and Hare's Case. *Intra 120.*

In this Case (which see before, fol. 1. b.) four Points were observed. Before fol. 1. b.

1. Whether Fisher the Assignee of the Rent were such a Person who shall take benefit of the Entry?

2. When 10 l. is only in Arrear, whether the Rent of 20 l. shall be said in Arrear?

3. Whether these Advantages which were first granted with the Rent may be granted over?

4. When the Use shall rise, whether upon the first Indenture of the Grant of the Rent, or afterwards? For the Case was, that the Grantee of the Rent of 20 l. covenanted by the same Indenture, that if the said Rent of 20 l. were in Arrear for the space of twenty days after any day of Payment, that the Grantee shall distrain, and if there be no sufficient Distresses upon the Land, or if there be a Relious, Replevin, or Pound-breach, that then it shall be lawful for the Grantee and his Heirs to enter into the same Land, and to retain it until he be satisfied: And the said Rent was granted, 9 Jac. it was Arrear, 11 Jac. the Fine for the better Assurance of the Rent was levied 12 Jac. and 13 Jac. the Distress was taken.

There were four Causes which give an Entry, and upon the Distress and Replevin brought the Assignee enters. As to the three first Points, it was resolved by the whole Court,

1. That Fisher was such an Assignee who shall take benefit of the Entry.

2. When 10 l. is only Arrear, the Rent of 20 l. shall be said Arrear, whereupon there shall be a Title of Entry.

3. That these Advantages granted with the Rent may be granted over.

And as to the fourth Point, it was holden by Mountague and Crook, that the Use riseth upon the first Indenture, and not upon the Entry after the Replevin brought, although the words are, that then it shall be lawful for the Grantee and his Heirs to enter, whereby the Use is only awaked, as it is in the principal Point in Shelley's Case, and although a Fine is afterwards levied, yet the Use shall be directed by the Original Indenture, and therefore 6 Rich. 2. A Feoffment is made to two and their Heirs, and afterwards a Fine is levied upon it for further Assurance, to the use of them and the Heirs of one of them, yet it shall go to the use of both, for it shall be respected according to the original Agreement, where there are divers Assurances for the perfecting of one and the same thing, 16 E. 3. tit. Age. A Daughter had a Heirship by descent, a Tenancy Escheats, a Son is born, he shall have the Land, see Sharoe's Case in 4 Mar. Dyer, and in Chudleigh's Case all looks to the original Agreement, and therefore Variance of time shall not hinder the original Agreement, as 33 Ass. the Servant intends to kill his Master, and afterwards the Master puts him out of his Service, and then he kills him, this shall be Petty Treason in the Servant, 28 H. 6. Two are bound in a

Bond at several times, and yet he shall declare against both, as upon the first Delivery; &c H. 7. it is adjudged, that if a Deed be delivered by an Infant, and afterwards it is again delivered when he comes of full Age: And sic Mallorie's Case, Finch's Case, and Boraston's Case, Nunc & tunc & quando, are a demonstration of the time, and not of the matter, and so they concluded that the Use shall rise upon the first Indenture, and not upon the Fine or Replevin brought; but Doderidge and Haughton Justices contra.

Trin. 17 Jac. In the King's Bench.

Silvester's Case.

John Silvester promised to John B. that if he would marry his Daughter, that he would give with her a Childs part; and that at the time of his death he would give to her as much as to any of his Children, excepting his eldest Son, and afterwards he made his Executors and died: J. B. brought an Action upon the Case against the Executors upon this Promise, and shewed that the Executor had not given him a Child's part, and that such a younger Son of the Testator's had an 100 l. given him: And it was resolved by the Court that the promise of a Childs part is altogether uncertain, but being so much as any of his Children had, and then shewing that the younger Son had an 100 l. this was certain enough, and thereupon Judgment was given for the Plaintiff.

The same Term in the same Court.

Godfrey and Owen.

Words.
He is a very
Varlet, and
seeks to suppress
his Brother's
will, &c.

Cornelius Godfrey was Plaintiff in an Action upon the Case for words against Owen Defendant, and the words were these, to wit, He is a very Varlet, and seeks to suppress his Brother's Will, he makes shew of Religion, but he is a very Hypocrite: And the words were spoken of a Merchant, to one who gave him much Credit in his Trade.

Mountague Chief Justice said, that the words which are Actionable in such a Case ought to touch the Plaintiff in his Profession, which these do not do, Et relata ad personam intelligi debent secundum conditionem personæ, for in the supressing of his Brother's Will the Case might be such that he might well do it, for perhaps there may be an after Will made; And for calling him Hypocrite lies not in the conusance of the Common Law, for God only can judge of the Heart of Man, and therefore these words do not touch the Plaintiff as he is a Merchant.

Doderidge Justice, Words ought to tend some way to the Ruin of the Party, or otherwise they are not Actionable; and Judgment was given, Quod querens nil capiat per billam.

Mieb. 16 Jac. In the Star-Chamber.

Sir John Bingley's Case.

In Sir John Bingley's Case in the Star-chamber, it was resolved by the two Chief Justices, Mountague and Hobart, and agreed by the Lord Verulam Lord Chancellor, and Sir Edward Coke, that if an Information be exhibited there which begins with divers particular Misdemeanors, and conclude in the general that, 1. The matter included in the general Charge ought to be Ejusdem generis. 2. They ought to exceed the Particulars expressed in number. 3. They ought not to be greater or more capital; whereupon Mountague cited the Statute which speaks of Deans and other Spiritual Persons, upon which it hath been resolved that Bishops are not within it, for they are of an higher degree: and the principal reason of these Rules was, because that a Man cannot possibly make a Defence, because he knows not what shall be objected against him; and upon this Sir John Bingley was discharged at this time for the most transcendent Offence that was objected against him, to wit, concerning Captain Baugh, and other Pirates to whom the King of his Grace and Bounty had given 200l. to make them Loyal Subjects; But Sir John Bingley, Colore officii, had defrauded them of almost all of it, for the want whereof some of them died miserably, and the rest became Pirates again. But Sir John Bingley made many Protestations of his Innocence in this matter. An Officer of

And it was holden also that one might be an Officer of his own Wrong, as his own wrong, there might be an Executor of his own Wrong: And this was Sir John Bingley's Case for something in the Information, for he committed Extortion, Colore officii.

The same Term in the Star-Chamber.

The Attorney-general put in an Information against divers Dutch Merchants, for buying and transporting of many great sums of Gold and Silver Bullion.

And it was said by the Court that divers Statutes had been made for redress of this mischief, as the Statute of 5 R. 2. the Offenders whereof ought to forfeit all they may: and by another Statute in 17 E. 4. this Offence was made Felony to continue for seven years: But the Court would not now punish them upon any Statute, for it was an Offence at Common Law, and therefore punishable in this Court.

And Sir Edward Coke said, that if any be to be punished upon a penal Statute, it ought to be within two or three years at least after the Offence committed, for the Informer hath but a year to sue, and the King two years for the most part.

The Statutes of 37 E. 3. and 5 E. 6. prohibit the buying of Coin, and that it is so at the Common Law, see 21 E. 3. 60. and Plowd. 215. and not only he that buys, but he that sells also offendeth in it, for it is a Prerogative only belonging to the King, and it is his Coin, and none can put a Value upon it but himself, which is a Flower of his Crown.

Hobart Chief Justice of the Common Pleas, as one shall be punished for ingrossing any Commodity, a Fortiori, one shall be punished for ingrossing and buying of a great quantity of Money, all other Commodities being thereby ingrossed

To carry Gold
and Silver out
of the Realm,
punishable at
Common Law.

ingrossed, for Money is the Mistress of Commerce : Pecunia est rerum omnium vendendarum mensura, Bracton 117. 18 E. 3. Hollinghead 109. 50 E. 3. Rot. Pat. Memb. 7. And for Transportation, 17 E. 3. & 19 E. 3. Rot. Pat. 24. De monetis non transportandis, 19 R. 2. Rot. Pat. The Dutchels of obtained License to melt Coin to make Plate. And divers of the Defendants were within the King's general Pardon, but in as much as they pleaded it in their Rejoynder, and not in their Answer (as it ought to be) the Court overruled their Plea, so that they could have no advantage thereby. But in as much as they were Strangers, and not consonant of our Laws, and relied only upon their Counsel, the Court had consideration thereof in their Censure.

Hillary, 17 Jac. In the King's Bench.

Serle *versus* Mander.

Words,
I arrest you upon Felony. **S**erle brought an Action upon the Case against Mander for these words, to wit, I arrest you upon Felony, and after Verdict for the Plaintiff, it was moved in Arrest of Judgment by Richardson that the words were not Actionable, for he doth not say, that the Plaintiff had committed Felony ; But it was resolved by the Court, and so adjudged that the Action lieth.

The same Term in the same Court.

Judgment a-
 gainst a Defen-
 dant when be-
 yond Sea with
 an Ambassador
 reversed.

AJudgment was obtained against one of the Servants of the Lord Hay, Viscount Doncaster, when he was Ambassador in Bohemia, and attending upon him there : And this matter being disclosed to the Court by the Council of the Defendant, they would not suffer the Plaintiff to have Execution upon the said Judgment, but ordered the Plaintiff to declare De novo, to which the Defendant should presently answer.

Impariment.
 Memorandum. It was said to be against the Course of the Court, to have an Impariment before the Declaration entered.

The same Term in the same Court.

The King *against* Briggs.

A Subject can-
 not have a Fo-
 rest.

AQuo Warranto was brought by the King against Briggs, for exercising of certain Privileges, who justified by virtue of a Forest granted to him : And by Bridgeman, this is the first Quo warranto which he knew that had been brought against any Subject for a Forest, for a Subject cannot have a Forest, but he may have a Chase, which peradventure may pass under the name of a Forest. And there are divers Incidents to a Forest which a Subject cannot use nor have ; there ought to be a Justice of a Forest which a Subject cannot have, and such a Justice ought to be a Man of great Dignity. 2. There ought to be Verderers who are Judges also, and by 34 E. 1. Ordinatio Forestarum, ought to be by Writ, but a Subject cannot award a Writ. Also there are three Courts incident to a Forest.

1. A Court of Attachments which may be without Verderers.
2. The Swainmote Court.

3. The

3. The Justice Deat, and this appeareth in 1 E. 3. cap. 8. 21 E. 4. cap. 8. But by the Statute of 27 H. 8. cap. 7. There are some other Incidents to a Forest. 2. Admit that a Subject may have a Forest, yet it fails in this Case, because he hath shewn the Exemplification and not the Letters Patents, and see Coke, lib. 5. Pain's Case, that neither an Exemplification, or Constat, are pleadable at Common Law, and Coke, lib. 10. Dr. Leyfeld's Case.

The same Term in the same Court.

sir William Webb versus Paternoster.

THE Case was this; Sir William Plummer licensed Sir William Webb to lay his Hay upon the Land of the said Sir William Plummer until he could conveniently sell it, and then Sir William Plummer did make a Lease of the Land to Paternoster, who put in his Cattel, and they eat up the Hay: And it was two years between the License and the putting in of the Cattel, and yet Sir William Webb brought an Action of Trespass against Paternoster for this.

Mountague Chief Justice: 1. This is an Interest which chargereth the Land into whose sober hands it comes, and Webb shall have a reasonable and convenient time to sell his Hay. 2. The Lessor ought to give notice to Sir William Webb of the Lease before he ought to put in his Cattel; to which Haughton Justice agreed in both Points: But Doderidge Justice said, that Sir William Webb had no certain time by his License, yet he concieveth that he ought to have notice: But it was resolved that the Plaintiff had a convenient time (to wit, two years) for the removing of his Hay, and therefore Judgment was given against him. But admit that there had not been a convenient time, yet the Court was of Opinion that the Plaintiff ought to have inclosed the Land at his peril, for the preservation of his Hay: And it was agreed that a License is countermandable, although it be concerning Profit or Pleasure, unless there be a certain time in the License, as if I license one to dig Clay in my Land, this is revocable, and may be countermanded although it be in point of Profit, which is a stronger Case than a License of Pleasure, see 13 H. 7. The Dutches of Suffolk's Case for a License.

Notice.

Convenient time.

A License whether for Profit or Pleasure countermandable.

The same Term in the same Court.

Sibill Westerman brought an Action upon the Case against Eversall, and had Judgment: and in the Entry of the Judgment she was named Isabel, 1 Ass. and 3 Ass. A Fine was levied by Sibill, when her name was Isabel, and it was not good, for it doth not appear to be the same Party; so in the Case at the Bar: And for this the Judgment was reversed.

Error.
Sibill for Isabel.

In the same Term in the same Court.

Jane as Executrix of [unclear] brought an Action upon the Case against Che- An Infant ster, because the Defendant made Request to the Testator of the Plaintiff chargeable for to buy for him certain Silk Stuffs for Apparel, and to make him a Cloak; necessary Ap- parrel. the Defendant pleaded that he was within Age, and George Crook said, that the Defendant should not be charged, because it is not shewn that the Appa- rel was for the Infant himself, but he was over-ruled in this, for it is suffi- ciently

tiently expressed to be for him. And it was agreed by the Court, that it ought to be shewn that it was Pro necessario vestitu, and it ought to be suitable to his Calling, and (as Doderidge said) that there was a Case adjudged in this Court between Stone and Withipole, that where Withipole had taken of Stone certain Stuffs for Apparel, being within Age, and afterwards he promised Payment if he would forbear him some time, and the Assumpſit adjudged not good, because he was not liable for the Debt at first for the reaſon aforesaid.

Trin. 17 Jac. In the Common Bench.

Gilbert de Hopton's Case.

Words.
*Thou art a Thief
and hast stolen
my Furze.*

An Action upon the Case was brought for these words, viz. Thou art a Thief and hast stolen my Furze: And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that these words were not Actionable: But it was said on the other side, that to say, thou art a Thief, is Actionable, and the subsequent words are in the Copulative, and enure as a confirmation of the precedent words: But if it had been so, Thou hast stolen my Furze, this had been an explanation of the precedent words, and therefore in that Case the Action would not have been: And it was answered and resolved by the Court that the word (and) in some Cases shall be taken as the word (for) and so it shall be in this Case, and therefore adjudged that the Action lies.

Mich. 22 Jac. In the Star-Chamber.

Fines in the
Star-Chamber
for killing the
King's Deer.

TWELVE Men came Oue tenus into the Star-Chamber, for Stealing of the King's Deer, and were fined an 100 l. apiece, and three years Imprisonment, unless it would please the King to release them sooner, and before they should be released of their Imprisonment to be bound to their god Behaviour: And it was observed by the Attorney-general that the Offence was the greater, in regard that the King had but one Darling Pleasure, and yet they would offend him in that: And it was said by some of the Court that it was a great folly and madness in the Defendants to hazard themselves in such a manner for a thing of so small value as a Deer was. The Lord President said, that Mr. Attorney was the best Keeper the King had of his Parks, in regard he brings the Offenders into this Court to be punished: The Lord Keeper said, that the Defendants in such a Case being brought Oue tenus are not allowed to speak by their Council, and yet these Men have had their Council, but it was Peter's Counsellors, meaning, their sorrow and Contrition at the Bar, which much moved him, so that if his Vote might prevail he would set but 20 l. fine upon them.

The same Term in the same Court.

THREE Lord Morley and Sir Richard Molineux being beyond Sea, their Sollicitor in their names exhibited a scandalous Bill in the Star-Chamber against the Bishop of Chichester, and after their Return this continued so for three years, without any disclaiming thereof by them, and now the matter

ter being question, they said that it was not done with their Privity: But because they had not disclaimed the Fact before, they were fined an 100 l. to the King, and an 100 l. to the Bishop for Damages, and the Bill was to be taken off the File.

The same Term in the same Court.

Lewes Plaintiff versus Jeoffreys, and others Defendants.

TH E Plaintiff's Brother had been a Sutor to a Woman, which matter proceeded to a Contract, and afterwards the Defendant Jeoffreys happened to be a Sutor to her also, whereupon (being Rivals) they fell out, and the Plaintiff's Brother called the Defendant Jackanapes, which was taken very ill by the Defendant (being a Justice of Peace in the County of Worcester, and the other being but a mean Man in respect of him) so that he told him that if he would meet him on Horse-back he would fight with him: afterwards one of the Sons of the Defendant went to the said Brother (being upon his own Land, and gave him a mortal Wound, whereupon a Friend on the behalf of the Party wounded, came to the Defendant (being a Justice of Peace) and brought him a piece of his Skull, to the end that his Son should be forthcoming at the next Assizes, declaring to him the danger of death the Man was in: whereupon the Defendant took a Recognizance of 10 l. of his Son and of his Sureties of 5 l. apiece to answer this at the next Assize: And in the mean time the Party died of the said Wound, and the Son did not appear at the Assizes, and the Judges of Assize fined the Defendant an 100 l. for taking such slender Security for the Appearance of his Son, which was paid, and yet notwithstanding the Defendant was fined 200 l. more for this Offence, A Challenge and also 200 l. for his Misdemeanor in his Challenge, albeit the Defendant was of the Age of 63 years, and so it seems that he intended to fight with him. But he being a Justice of Peace (who is Conservator pacis) he did against his Duty to do any thing which may tend to the breach of the Peace.

And for the other matter it was said by the Court, that the Defendant being Father to the Offender, it had been better for him to have referred this matter to another Justice of Peace, or at least to have had the Assistance of another: And the Party being in such great danger of death, his Son was not Available.

Hill. 1 Car. In the King's Bench.

*Bowyer *versus* Rivet.*

TH E Case was thus; Sir William Bowyer, 12 Jac. recovered against Sir Thomas Rivet in an Action of Debt, Sir William made his Wife his Executrix and died, the Wife made Bowyer her Executor and died; then Sir Thomas Rivet died, Bowyer brought a Scire facias to have Execution upon the Judgment against Sir Thomas Rivet the younger, as Heir Apparent to the Land to him descended from Sir Thomas Rivet, who pleaded Riens per descent from Sir Thomas Rivet, and it was found that he had two Acres and an half of Land by descent; and it was prayed by Goldsmith, that Judgment might be given against Sir Thomas Rivet generally, for he said, that this

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false Plea shall charge him and his own Lands, and cited Plowden 440, where in Debt against an Heir, upon his false Plea, his own Lands shall become liable to the Debt, and Co. lib. 3. i. b. Sir William Herbert's Case, where the Case was upon a Scire facias against the Heir, as it is in this Case.

But on the other part it was argued by Richardson the King's Serjeant, Banks, and all the Justices, that Execution shall be awarded in no other manner against the Heir than it should be against his Ancestors, or other Purchaser, to wit, of a Property of that which he had by Descent, for as much as in this Case he cannot be to this purpose charged as Heir, but he ought to be charged as Tenant and as a Purchaser, and a Purchaser shall never hurt himself but his false Plea.

And Banks argued, that the Heir in this Case is charged as a Purchaser, and the false Plea of a Purchaser shall never charge himself, 33 E. 3. Fitz. Execution, 162 and 6 E. 3. 15. and that in this Case he is charged as Tenant appears by these reasons.

1. Debt will not lie against an Heir, but where he is bound as Heir, but in this Case Execution is to be sued against him as another Tenant, Dyer 271. 11 E. 3. 15. and in 27 H. 6. Execution 135. and Co. lib. 3. 12. b. That in Judgment upon Debt or Recognizance the Heir is charged and Execution shall be sued against him as Tenant.

2. There is not any lien as Heir, for the Judgment doth not mention the Heir, and therefore he cannot be charged unless he be expressly bound, and in the Record of the Recovery, it doth not appear that the first lien shall bind the Heir, for he declares that he bound himself, and not that he bound himself and his Heirs.

3. If the Heir were bound in the Obligation so that he were once bound as Heir, yet the Judgment determines the Specialty, so that now he is not bound, and in the Judgment the Heir is not mentioned, as in 10 H. 4. 21. 24. If an Abbot contract to the use of the House without consent of the Convent, this shall bind if he dies, but if he takes an Obligation of the Abbot and then he dies, this shall not bind the House, for the Contract is determined by the Obligation, and this is the reason that in the time of E. 3. in a Recovery upon Debt the Obligation was cancelled.

Where a Debt
is recorded
upon Bond
the Obligation
was cancelled.

4. Here he cannot be charged as Heir, for it appeareth by the Record that his Father is living, for it is brought against him as Heir Apparent, which he cannot be but during the life of his Father.

And as to the Objection, that in this Case he shall have his Age, and therefore shall be charged as Heir, Non sequitur, for if Execution be sued against the Heir of a Purchaser, he shall have his Age, and yet he is not Heir, neither can be charged as Heir to the Convent: But because it is a Rule in Law, that the Heir which hath by Descent shall not answer where his Inheritance may be charged during his Nonage.

Whitlock to the same intent, because the Heir is not charged here as Heir, but as Tenant, whereby his false Plea shall not hurt him, with which Jones also agreed, and said, that he here considered these things.

1. That the lien of the Ancestor binds the Heir.
2. How the Heir shall behave himself in pleading.
3. Our Point in question. For the first there are two things requisite to bind one as Heir. 1. A lien express, for if one bind himself, and not his Heir, this shall not bind his Heir in any Case. 2. A Descent of Inheritance, for without this he shall not be bound by the Act of his Ancestor, and he is bound no longer than Assets descend, for if he alien before the Asset purchased the lien is gone. 2. He ought to behave himself truly and plead truly, and confess the Assets descended to him, when Debt is brought against him as Heir, otherwise his own Lands shall be charged with the Debt, as it is in Pepy's Case in Plow.Com. But where it is said in Pepy's Case, that upon a Nihil dicie,

or Non sum informatus, &c. If the Judgment pass upon them, that it shall be general; I am not of that Opinion, for the common Experience of the Courts is, that such a general Judgment shall not be given against the Heir; unless it be upon a false Plea pleaded, with which agrees Lawson's Case, Dyer 81, and Henningham's Case, Dyer 344. where the Judgment passed by Nihil dicit, so that the saying in Plow. 440. a. that what way soever the Heir be condemned in Debt, if he do not confess the Assets, &c. that it shall be his proper Debt, is now taken for Law.

And I also hold, that if the Heir plead falsly, and there is found more Assets, that yet it is in the Election of the Plaintiff to charge him, and to take false Plea by an Execution of the Assets only, or to take an Elegit of all his Land, and he is not bound to take an Elegit of all the Land in this Case, for otherwise inconvenience may arise: If the Heir hath an hundred Acres by Descent, and two by Purchase, if upon the false Plea of the Heir the Plaintiff cannot have any other Execution but an Elegit of the Property of his Lands, then he by this is prejudiced, for otherwise he might have all the Assets in Execution, and so the Heir by this way shall take advantage of his false Plea. 3. He held as Whitlock before, and for the same reason Doderidge Justice: How the Heir shall be bound by the Act of his Father, is worthy of Consideration, upon which Prima facie the Books seem to disagree, but being well considered, accord with excellent Harmony. I have considered this Case, it was moved at Reading Term, and because my Notes are not here, I will speak more briefly, and will consider,

1. How an Heir shall be charged upon the Obligation of his Father: and as to that in Debt against an Heir, he is charged as Heir, so that at this day it is taken as his proper Debt, whereby the Wit is in the Debet and Detinet, but in the Detinet only against Executors: But in former time from the 18th of E. 2. till 7 H. 4. if an Executor had Assets, the Heir was not chargeable, but in 7 H. 4. the Law changed in this Point, for now it is accounted his own Debt, and Debt will lie against his Executors, as it is said in Plow. Com. and so against the Heirs of the Heir to many Generations, albeit of this Plowden makes a doubt, and his Plea that he had nothing at the day of the Wit purchased, nor ever after, is good, for if he alien the Assets he is discharged of the Debt, in regard he is not to wait the Action of the Obligee.

2. The Heir shall be charged upon the Recognizance, not as Heir, but as Ter-tenant, for he is not bound in the Recognizance, but only the Conulor grant that the Debt shall be levied of all his Lands and Tenements, but not against his Heirs. And here he is not marily as Ter-tenant, for he shall not have Contribution against other Ter-tenants, but only against those who are Heirs as himself is, but to all other intents he is Ter-tenant, and so charged, as 32 E. 3. and 27 H. 6. are.

3. That upon a Judgment (as our Case is) the Heir shall be charged as Ter-tenant and not otherwise: The Book which hath been cited, viz. 33 E. 3. Execution 162. is expell in the point; the broken years of Fitzherbert are obscurely reported, but by comparing of Cases it will appear to be our Case expressly.

4. That albeit an Heir shall be charged upon the Obligation of his Ancestor, where he is particularly bound, yet upon his false Plea no Execution shall be but upon the Assets: So it seems to me that in the principal Case the Judgment shall be special, and it seems to be a very plain Case.

Crew Chief Justice agreed, and in his Argument he affirmed what Jones said, that a general Judgment shall not be given against the Heir, if he do not plead falsly that he hath no Assets, and not upon Nihil dicit: And so Judgment was given that the Plaintiff shall have Execution of the Property of the Lands descended to the Defendant; and so note the diversity of Debt against the Heir, and Scire facias against the Heir.

Hill. 1 Car. *In the King's Bench*, Intr. Hill. 18. Jac. Rot. 189.

Dickenson *versus* Greenhow.

In an Attachment upon a Prohibition, the Plaintiff declared that where Robert the last Abbot of Cokerham in Lancashire, was seised in Fee of three Acres of Land, parcel of his Monastery, and that the Abbot and his Com-monks, and all the Predecessors of the Abbot were time out of mind of the Order and Rule of Premonstratenses, and that the Order of Premonstratenses, and all Monks thereof, were time out of mind discharged of payment of Tythes for their Lands and Tenements, Quamdu manibus propriis aut sumptibus excolebant. And that the said Abbot and all his Predecessors time out of mind had holden the said three Acres discharged of payment of Tithes, Quamdu, &c. and so held them until the dissolution of the Monastery, and shew the Surrender to H. 8. and the Statute of 31 H. 8. by force whereof H. 8. was seised, and held them discharged, and from him derive them to E. 6. and from E. 6. to Queen Mary, and from her to Queen Elizabeth, and from her in the 42d year of her Raign to Wagstaff, and from him by mean Conveyances to Dickenson the Plaintiff, Quorum pretextu he was seised, and enjoyed them in Propria manurantia, and shew the Statute of 2 E. 6. cap. 15. whereby it is enacted that Tythes shall be payed as usually they were, &c. Quorum pretextu, the Plaintiff held the three Acres discharged of Tythes, and that notwithstanding, and against the Prohibition, the Defendant did draw him into Plea for them in Court Christian, and the Judge thereof held Plea, and the Defendant did there prosecute him to the Disinherison of the Crown: And upon this the Defendant demurred, and prayed a Consultation. And Sir John Davies the King's Sergeant argued for the Defendant, that a Consultation should be granted, because that his matter of discharge is double.

1. His Privilege. 2. The Prescription: and if either of them will not help him, then he ought to be charged: For the Privilege, he took it that the Premonstratenses never had such a privilege. It is a Maxim in Law, that all Persons ought to pay Tythes, and all Lands shall be charged with them of common Right; but also there are divers Discharges of them and allowed by our Law (as is manifest by the Orders of Templars, Hospitalers and Cistercians, which Discharges our Law allows) and these are, 1. By Prescription. 2. By real Composition. 3. By Privilege obtained, and that by two ways.

1. Either by the Bull of the Pope, for he taking upon himself to be the great Dispenser and Steward of the Church, took upon him to discharge them, but this (as it is holden by the Canon) he could not absolutely do, but might divert them to a Clergy-man, or grant to another to hold them by way of Renter, and this ought to be to a Clergy-man also. Or,

2. By a general Council, for some Orders were discharged by General Councils: So some obtained Privileges by the Pope's Bulls, which are his Patents, some by Councils which are his Statutes, and Decrēs were as Judgments, but yet none of them had ever any force in our Law, nor did bind us in England more than voluntarily retained and approved by usage and custom, for as it is said in 11 H. 4. the Pope cannot alter the Law of England, and this is evident, for in all Cases where the Bulls or Constitutions of the Pope cross the Law of the Land, they have always been rejected; as for instance,

1. In the Bulls which are of four sorts.
1. Of Provision.
2. Of Citation.

All Lands
chargeable
with Tythes.

The Pope's
Bulls of four
sorts.

3. Of Exemption. And 4. Of Excommunication. And as for those of Excommunication, it appeareth that it was Treason at Common Law, and that the Treasurer did knæl to E. 2. for one who brought them in, and in the perpetual course of the Books afterwards, they have always been disallowed in Pleas. So his Bulls of Citation, before the Statute of Provision was an hainous Offence, and so are Bulls of Provision and Exemption. For his Canons, where they were against the Law they were neglected. It appear-eth by the Canon, Quod nullus capiat beneficium a Laico, and yet notwithstanding continued long after for Benefices, and does yet for Bishopricks, that the Clergy shall take them from the King and a Lay-hand: And also there is a Canon for Exemption of Clarks out of temporal Jurisdiction: but yet as Brian saith, 10 H. 7. 18. it was never observed here. So that Canon saith, that the time of the Laps shall be accounted Per septimanas, but our Law not regarding this, saith, that it shall be accounted Per menses in the Calender, as it is expressly adjudged in 5 E. 3. Rot. 100. Rot. claus. in turri: And there is a great reason for it, as it is in 29 H. 3. memb. 5. in turri. It is not necessary for Bishops of England to go to general Councils; so as in Parliament those that do not send Knights or Burgesses shall not be bound by Statutes. And the Councils of Lyons, of Bigamis, &c. are expounded by Statutes how they shall be taken; so that if they have a Privilege (as in truth they have) by the Pope's Bulls, if it were not allowed in England, they are not of force to privilege them against the Common Law of the Land for payment of Tythes; but this was never here allowed.

And now for the Prescription this cannot help them, for Monks are not of Evangelical Priesthood, to wit, capable of Tythes in the Pernancy, but merely Lay-men, and then as the Bishop of Winchester's Case is, they cannot prescribe in non decimando; And Bede saith of them, that they are Mere laici, so that if their Privilege were allowed, the Prescription would not help them. The Privilege of Praemonstratenses was by the Council general of for their Discharge, which denies that all Religious Persons should be discharged of Tythes of Lands in their own hands, Quamdiu, &c. But afterwards Adrian restrained it to the Templars, Hospitalers and Cistercians, omitting the Praemonstratenses; and the Decree of Adrian was received also, whereby the Law took notice of the discharge of the said thre Orders. True it is, that the Praemonstratenses have a Bull of Pope Innocent the Third, of Discharge, and as large Liberties as the Cistercians, but they never put this in ure: And it liems, 1. That there were of them twenty nine Abbots and Abbies, and yet their Privilege is not mentioned in all the Books as the Cistercians is. 2. They complained to Gregory the Ninth, that they were not suffered to put it in ure, and notwithstanding this Complaint and Command of the Pope to the Clergy to allow them this Privilege, yet 24 H. 3. Complain was made against them in Parliament for claiming this Privilege: But the Statute of 2 H. 4. cap. 4. put this out of doubt, for this put the Cistercians in a premunire, for purchasing and putting in Execution Bulls of Exemption of their Lands purchased afterwards.

Now if the Praemonstratenses had the same privilege they should not have been omitted out of this Statute; then comes the Statute of 7 H. 4. cap. 6. which terrifies all from putting in Execution Bulls of Exemption of their Lands not put in Execution before, upon which it is not to be presumed that it was put in Execution afterwards.

But admit that the Praemonstratenses had this privilege: I say, that the Plaintiff hath not applied this Privilege to himself, for he hath not averred in fact that at the time, &c. Propriis manibus excusat, nec ad firmam demictebat; And this he ought to have done if he would take advantage of the Privilege, as in Dickenson's Case, Novel lib. intr. 5+2. there it is expressly al- ledged

ledged in the like Case, as ours is here, and where the same Privilege as here is claimed, Quod manibus propriis excolebat.

True it is that it is said here, that after the Feofment to him made, he was seised Et gavisus fuit in propria manuten. but he doth not say, that at the time of the Tithes due, gavisus fuit, &c. as he ought expressly to have done, as appeareth by other Cases.

If one prescribe to have Common in Arable Land when the Corn is reaped, or in Meadow where the Hay is carried away, and justifie by reason thereof he ought to aver that the Corn or Hay was carried away when he put in his Cattel, otherwise he hath not applied the Prescription to himself.

So if one justifie for Common Quandocunque averia sua venerint, he ought to aver that his Cattel then went in the place where, &c. as 17 Ass. 7. So if the King pardon all but those who adhere to M. he who pleads it ought to aver that he did not adhere to M. So here the privilege is Quamdiu propriis manibus, &c. and therefore at the time he ought to aver that he had it propriis manibus, &c.

Also where upon the Surrender to H. 8. and the Statute, they conclude that the Queen held it discharged, this cannot be, for this ought to be in such manner as the Abbot held it discharged, but this was quamdiu, &c. and the King cannot be bound to such an unbecoming Condition, and therefore he shall hold it discharged: Like to the Case where the Abby hath the Presentation, and another the Nomination, the Abby Surrender, he who hath the Nomination shall have all, for the King shall not present for him, it being a thing undecent for His Majesty, and so he concluded for the Defendant.

Banks contra. 1. That it is a good cause of Prohibition. 2. That it is well applied to us.

1. That the Order of Premonstratenses is discharged of Tythes, that they had once this privilege, hath been allowed by the other Party, by the Bulls of the Pope, and that it was allowed and taken notice of, he proved by this that this Bull was confirmed by King John in the 24th year of his Reign, the Charter whereof he said he had under Seal, and 22 E. 1. membran. 5. there were 26 Abbeys of this Order, and the King took them all into his Protection with their Immunities, and 22 R. 3. John de Gant having Jura Regalia in Lancashire (where the Abby is) confirmed to them this Bull, and also this hath been divers times allowed and decreed to them in Court Christian for Suit of Tythes, as in the Case of the Abby of Bigham which was of the same Order.

And as to that which was objected, that if the Premonstratenses had such a privilege as the Cistercians in 2 H. 4. that the like provision would have been against them.

As to this I answer, that such a Provision is not against the Templars nor Hospitalers, and yet they have such a privilege.

2. It may be that they never enlarged their Privileges above their Grant. And for the Statute of 7 H. 4. our Privilege was not then new, and it was afterwards allowed in 22 R. 2. And also I conceive, that if the Abby were discharged at the time of the Dissolution, although not De jure, yet this is a sufficient Discharge within the Statute of 31 H. 8. as it is taken, Coke, lib. 11. 14.

2. I hold that they may here prescribe to be discharged of Tythes, because they are Spiritual Persons, and capable of Cure of Souls, and capable of Tythes in Permancy, as is an Appropriation he made to them.

3. It is not now to be argued, whether they have such a Privilege, for they have demurred, which is a Confession of all matters in Fait, &c.

4. If there be a matter whereupon the Prohibition may be grounded it will serve, vide Dyer 170, 171. Co. lib. 10, 11.

And 5. The Privilege is well applied, because it is shewn that they were once discharged.

6. He n̄d̄s not to shew how he is discharged, 22 E. 4. 4. 5 E. 4. 8. 20 E. 4.

15. Also the Discharges are temps dont, &c. and therefore not pleadable; so he prayed that the Prohibition might stand.

Pasch. 1 Car. In the King's Bench.

Bowry *versus* Wallington.

Note that in this Case upon the Statute of 50 E. 3. 4. it was agreed by the Court, that if there be a Suit in the Ecclesiastical Court, and a Prohibition awarded, and afterwards Consultation granted, that upon the same Libel no Prohibition shall be granted again, but if there be an Appeal in this Case, then a Prohibition may be granted, but with these differences.

1. If he who appeals pray the Prohibition, there he shall not have it; for then Suits shall be deferred in infinitum, in the Ecclesiastical Courts.

2. If the Prohibition and Consultation were upon the Body of the matter and the substance of it, for otherwise he shall be put many times to try the same matter, which is full of vexation. And the Case was moved again, and argued by Noy, which was thus.

Wallington libelled in the Ecclesiastical Court against Bowry for Tythes of Wool and Lamb, and Bowry upon suggestion of a Modus decimandi obtained a Prohibition, and had an Attachment, and declared upon it, and are at Issue upon the Modus, which is found for the Defendant, and Consultation granted, whereupon Judgment was given in the Ecclesiastical Court against Bowry, upon which Bowry appealed, and prayed a new Prohibition, and had it, and Noy moved for a Consultation. 1. Because that a Prohibition and an Attachment upon it are but one Suit, for the Contempt of the Party in bringing his Suit in another Court, and translating this from the King's Court, and when it is once tried for the Defendant, the same thing shall not be tried again. And as to the Statute of 50 E. 3. 4. upon the mistake whereof the mistake is raised, he confessed that the printed Books, and also in the Extract of the Parliament, one Roll remaining in the Tower is (the same Judge) but the Parliament Roll it self, and the Petition is, Liceatque Judici Ecclesiastico five diocess. eidem an hujusmodi, and the Answer to the Petition is, one Consultation granted sufficeth in this Case: And the Parliament Roll it self was brought into the Court and viewed, but he said, that if it were as it is in the printed Book and Extract, the same Judge shall not be intended the same personal Judge, but the same Judge of Consulane of the same Jurisdiction or Cause, for otherwise, if another Commissary be made, as the Bishop may when he will, his Successor may be newly prohibited, and also one thing may be infinitely tried, for in many places the Suit begins in the Arch-deacon's Court, and from him an Appeal may be brought to the Bishop.

Where several
Prohibitions
may be grant-
ed in the same
Case, and
where not.

160 Pack versus Methold. ¶

The same Term in the King's Bench.

Pack versus Methold in a Writ of Error.

In Mich. Term, 22 Jac. Methold brought an Action upon the Case in the Common Pleas against Pack, and declared that in consideration that the Plaintiff would pay to Playsford 52 l. 14 s. to the use of the said Pack, such a day, &c. Pack promised to deliver to him his Bond (in which he was bound to him in the said sum) when he should be thereunto requested: And shews that he had paid, &c. and the Defendant did not deliver to him the Bond, albeit the same to do he was afterwards often times requested, and upon Non assump-
tio pleaded, it was found for the Plaintiff, and now it was moved in Arrest of Judgment, because the Request is not laid specially, nor the day nor place thereof expressed. But the Court, to wit, Hobart Chief Justice, Hutton and Harvey gave Judgment for the Plaintiff, and yet they agreed, that if he had demurred upon the Declaration, it had not been good, and also that if it had been general, Licet sibi quisquis requirit, it had not been good, in as much as it is parcel of the Promise, and therefore ought to be laid substantially; viz. That it was after the promise and payment of the 52 l. but the time is supplied by these words Postea, and there is no defect but in the place; and (Postea) im-plies that it was after the promise and payment.

And Hobart said, that all the Points of the Declaration which have matter and substance are good, only there wants the place where the Request was made, which by the Issue is moved, and the Request is here well notified to the Court, and the defect of the place is now helped by the Statute.

Hutton said, that if the promise had been to pay so much upon Request at Easter, then the day ought to have been shewn, and (Postea) had not been sufficient; but here the Postea refers only to a thing whereby it is certain; and he said, that upon this Issue such a Request shall be given in Evidence.

Harvey said, that the Request being here laid as it is, the Court may well give Judgment: And it seemed to Hobart that such a Request cannot be given in Evidence where the Issue is upon an Assumption: And Judgment was given for the Plaintiff; and afterwards a Writ of Error, Hill. 1 Car. was brought in the King's Bench, and the Opinion of the Court was strongly, that the Plaintiff ought to have alleged the Request specially and certainly in time and place, because it is traversable and parcel of the Assumption, and not to be done but upon Request.

Jones Justice remembred others Presidents in the Point, and further day was given to bring in Presidents of either side, and two Presidents were produced according to the Opinion of this Court, Scil. Pasch. 30 Eliz. Rot. 464. in 1. Court, Old and Estgreen's Case, Trin. 16 Jac. Rot. 268. Wales Case.

But in Debt Licet sibi quisquis requirit is sufficient, for it is not material nor traversable, for the bringing of the Action of Debt (which is a Precipe) is a sufficient demand in it self, and afterwards at another day the Court continu-ed of the same Opinion, and therefore the Plaintiff in the first Action brought a new Action, Quod nota, for albeit the Defendant had pleaded Non assump-
tio, and Issue was joyned upon it, yet this did not amend the evil laying of the Request, according to the Presidents abovesaid.

Where in an Action upon the Case, there ought to be a special Request, and where not.

Pasch. 2 Car. *In the King's Bench*, Intr. Hill. 1 Car. Rot. 135.

Constable *versus* Clobery.

In an Action of Covenant, the Question was upon the Traverse; the Plaintiff declared upon the Indenture of Covenant, and the Covenant was that a Ship shall go with the next fair Wind, and that the Merchant shall pay so much for Freight: the Defendant saith by way of Traverse, that he did not go with the next Wind, and it was objected by Stone of the Temple, of Council with the Plaintiff, that the Traverse was not good, but he ought to have traversed that the Ship did not go at all, for that which is material shall be traversed, and that the Ship did not go is the most material thing here, and this appeareth by 15 E. 4. 2. where a Gift in Tail is traversed, and not the death of the Tenant in Tail, 19 H. 8. 7. 36 H. 6. 16. 2 H. 5. 2. 2 H. 7. 12. and there are Cases to this purpose, Co. lib. 7. 9. Ughtred's Case: If a Man entitles himself to Land by an Estate which cometh by Condition, he ought to shew that the Condition is performed: A Covenant against a Covenant will not make an Estoppel, but he shall bring his Action, 3 H. 6. 33. Where he ought to shew that he went to Rome, because it is a precedent Condition: The principal Case in Ughtred's Case prove other, to wit, that which is material is alledgedable: And the difference upon the Case of 48 E. 3. 3. 4. Where A. Covenant with B. to reserve him with three Esquires in France, and B. covenant for to pay him 42 Marks, he may chuse to covenant in general or special, as he will, for there was Covenant against Covenant, and here there is a Covenant of one part to go with the Ship, and on the other part to pay so much for the Freight, and so Covenant against Covenant.

And it seemed to Doderidge Justice, that the Traverse is not good, for the Traverse here is by permission of God.

And for another thing where Merchants covenant to pay jointly and severally, according to the quantity of the Wares, there an Action of Covenant may be brought against one alone, for the Debt is several.

And by Crew Chief Justice, it cannot be a good Traverse, for a Circumstance cannot be traversed, for Wind is alterable, and a thing material is only traversable, and here the Covenant is several for their several Freights, and it may be that others have paid him.

Jones Justice, the Traverse is not good; and for the other matter he cited Matthewson's Case, Co. lib. 5. 22. Where upon a Charter-party if one Seal be broken all is gone. If three are bound jointly, and an Action is brought against one, and it appeareth that others have sealed, the Writ shall abate: But in this Case an Action lies against him alone, although the other be named in the Indenture.

The same Term in the same Court, Int. Hil. 22 Jac. Rot. 1019.

Mitten *versus* Faudrye.

An Action of Trespass was brought for chasing of Sheep, the Defendant pleaded that they were trespassing upon certain Land, and he with a little Dog chased them out, and as soon as the Sheep were out of the Land he called in his Dog, and upon this the Plaintiff demurred; The Point singly was

Justification in Trespass. was but thus; I chase the Sheep of another out of my Ground, and the Dog pursues them into another Man's Land next adjoyning, and I chide my Dog, and the Owner of the Sheep brings Trespass for chasing of them: And it was argued by Whistler of Grays-Inn, that the Justification was not good, and he cited Co. lib. 4. 38. b. that a Man may hunt Cattel out of his Ground with a Dog, but cannot exceed his Authority, and by him an Authority in Law which is abused is void in all, and to hunt them into the next Ground is not justifiable. The Books differ, if Cattel stray out of the High Way involuntarily, whether Trespass lies, 7 H. 7. 2. and H. 7. 20. but all agree, that they ought to be chased out as hastily as may be.

Littleton argued for the Defendant, that Cattel may be chased out into another Man's Ground, and he said that a Man cannot have such a power upon his Dog as to recall him when he pleaseth, and a Dog is ignorant of the bounds of Land, and he resembled this Case to other Cases of the Law; first to 21 E. 4. 64. In Trespass of Cattel taken in A. in D. the Defendant saith, that he was settled of four Acres called C. in D. and found the Cattel there Damage feasant, and chased them towards the Pound, and they escaped from him and went into A. and he presently recollect them, which is the same Trespass, and admitted for a good Plea: and 22 E. 4. 8. In Trespass the Defendant justifies by reason of a Custom that they which plough may turn their Plough upon the Land of another, and that for necessity, and it was allowed for a good Justification, and he hath more government of his Oxen, than in our Case he can have of his Dog.

If a Man be making of a lawful Chase, and cannot do it without damage to another, this is Damnum absque injuria, 21 H. 7. 28. And he cited a Case which was in Mich. 18 Jac. between Jenning and Maystoe, where a Man of necessity chased Sheep for taking one of his own, in Trespass he may justify it: And also if a Dog goes into the Land of another (as in this Case) Trespass does not lie, but otherwise it is of Cattel.

Crew Chief Justice, it seems to me that he might drive the Sheep out with the Dog, and he could not withdraw his Dog when he would in an instant, and therefore it is not like to the Case of 28 E. 3. Where Trespass was brought for entering into a Warren, and there it was pleaded that there was a Pheasant in his Land, and his Hawk flew and followed it into the Plaintiff's Ground, and there it seems that it is not a good Justification, for he may pursue the Hawk, but cannot take the Pheasant, 6 E. 4. a Man cuts Thorns, and they fall into another Man's Land, and in Trespass he justifies for it; and the Opinion was, that notwithstanding this Justification Trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard Case; But this Case is not like to these Cases, for here it was lawful to chase them out of his own Land, and he did his best endeavour to recall the Dog, and therefore Trespass does not lie.

Doderidge Justice agreed, for here was no Hedge, and when he saw them out of his own Ground, he rated the Dog, 12 H. 8. this difference is taken, if I see Sheep in my Land, I may chase them out; but if another sees them, and chase them out, I may have Trespass against him, because he hath taken away my advantage; and the nature of a Dog is such that he cannot be ruled suddenly, and here it appeareth to be an involuntary Trespass, 8 E. 4.

A Man is driving Goats through a Town, and one of them goes into another Man's House, and he follows him, Trespass doth not lie for this, because it was involuntary, and a Trespass ought to be done voluntarily, and so it is Injuria, and a hurt to another, and so it is Damnum.

If Deer be out of a Forrest, the Owner of the Land where they are may hunt them, and if the Deer flee to the Forrest, and the Hounds pursue him, then he ought to call in the Dogs, and so I may justify, and Trespass lies not.

In the time of Chief Justice Popham, this Case was adjudged in this Court.
Trespass

Trespass was brought for hunting and breaking of Hedges, and the Case was, that a Man started a Fox in his own Land, and his Hounds pursued him into another Man's Lands, and it was holden that he may hunt and pursue him into any Man's Land, because a Fox is a noysome Creature to the Commonwealth.

Bracon saith, that when a Man is outlawed he hath Caput lupinum, and he may be hunted through all the County: And he agreed the Case of 8 E. 4. Isa Tree grow in an Hedge, and the Fruit fall into another Man's Land, the Owner may fetch it in the other Man's Land, and he also agreed the Case of 22 E. 4. 8. of the Plough, and so concluded that the Trespass doth not lie.

Jones Justice, that the Trespass doth not lie, vide Co. lib. 8. 67. Crogate's Case, and lib. 4. Terringham's Case, and he cannot recall his Dog in an instant: And the same day Judgment was given for the Defendant, Quod querens nil capiat per billam.

The same Term in the same Court.

If a Replevin the Defendant pleaded that was seised In jure Collegii, and doth not say that he was in Dominico suo ut de foedo, and the Plaintiff demurred upon the Avowry. And Andrews argued for the Plaintiff.

1. The Defendant ought to have alledged certainly that they were seised in Fæ; for Littleton saith, that in Courts and Pleadings a Man ought to shew how he is seised, 8 E. 3. 55. 13 Eliz. Dyer 299. Pl. 31. An Inquisition was found upon an Extent of a Statute-merchant, and doth not shew how the Consulor was seised, but only that he was seised, and the Inquisition holden void. But it may be objected that if Land be given to a Dean and Chapter that they have Fæ, 11 H. 7. 12. I confess it: But the constant use of pleading hath always been in case of a Bishop, College, &c. to say, that they were seised in Fæ, as appears in Hill and Grange's Case, and Co. lib. 6. the Dean and Chapter of Worcester's Case, and Co. lib. 11. 66. Magdalen College Case; and it appeareth by 20 H. 7. in the Abby of S. Austin's Case, that an Abby may have a Lease Pur autre vie, and so perhaps here the Dean had a Lease but Pur autre vie, and therefore ought to have alledged that he was seised in Fæ, if the truth were so. And he moved other Exceptions, as 1. That the Defendant entitled himself to a Lease as Executor, and doth not plead Literas testamentarias.

2. That the Defendant entitles himself to a Rent, part of which was due in the time of the Testator, and part in his own time, and doth not shew when the Testator died, and therefore the Avowry not good.

Jeremy for the Defendant that the Avowry is good, and it cannot be otherwise intended but that they are seised in Fæ, 11 H. 7. Lands given to a Parson and Commonalty is Fæ simple, but otherwise of an Abbot and Parson, Plow. 103. and Dyer 103. A Seisin in Fæ is implied by Seisin In jure Collegii; and because it hath been objected, that he may be seised Pur autre vie, this is but a Foreign Intendment, for a Fæ is always intended Seisin in Fæ simple.

For the second Objection, because Non proferit literas testament. true it is if he entitle himself merely as Executor, he ought to bring in Literas testamentar. but our Case is not so, for here we are Defendants, and we endeavour

only to excuse a Tort, 36 H. 6. 36. Where a Man is Plaintiff he ought to shew Literas testamentar. that so the Court may see that he hath cause of Action, but here it is only by way of Excuse.

For the third, that the death of the Testator doth not appear is not material, for if any part be due to him, it is due as Executrix.

Doderidge, they ought to have pleaded that they were seised in Fœ; true it is, that Land given to a Mayor and Commonalty is Non-simile, and the reason is because they are perpetual, and if the Estate be not limited, they shall take according to their Continuance, 11 H. 4. 11 H. 7. and 27 H. 8. Dockray's Case, they may be seised Pur terme dauer vie, but if they had pleaded that they were seised to them and their Successors, this pleading is good, Prima facie, 17 E. 3. 1.

Crew Chief Justice, all the Authorities are that they were seised in Fœ, In jure Collegii, and it is not good to admit a new way of pleading.

Jones Justice, Tenant Pur auter vie makes a Lease for years, and cestui que vie, dies, he cannot have an Action of Debt against Lessor for years, for he is now Tenant at sufferance. But for the first Point, it seems to him that the pleading is not good, for although in point of Creation, they take a Fœ by a Gift to Dean and Chapter, yet in pleading they ought to alledge their Estate specially, for they may have an Estate Pur auter vic: And this is in an Avowry which shall be taken strigly. And by Crew Chief Justice the Defendant here ought to shew Literas testamentar. for he is an especial Actor in the Avowry. And by Doderidge, Longissimum vitæ tempus est 100 years, Co. lib. 10. 50. Lampet's Case, and therefore in pleading, if the Defendant had said, that a Dean and Chapter were seised, and made a Lease for 200 years, this implies a Heislin in Fœ, because a Man cannot have so long a Life, but here the Lease is but for 89 years, and it is common to let for 89 years, if A. shall so long live, yet this is but a slip, and the Title is apparent.

The same Term in the same Court.

Hodges *versus* Moore.

In a Debt for Marriage-Money, the Case was this: A Man was bound to Hodges to pay him a 1000 l. after that he had married his Daughter, and afterwards he married her, and brought Debt upon this Obligation, and it was not averred that he had given notice to him of the Marriage, but demanded the Money: And this was moved by Noy in Arrest of Judgment (but quare if request afterwards doth not imply notice.)

Where notice
is requisite be-
fore Action,
and where
not.

And Doderidge Justice put this Case, A Man is bound to pay an 100 l. two months after A. return from Rome, he ought to give notice of his Return before he can have an Action upon this Obligation, for he may land at Newcastle, or Plymouth, where by common intendment the Obligor cannot know whether he be returned, or not; and this was agreed by the Chief Justice and Jones.

And Sergeant Davies argued for the Plaintiff, that there need not precise notice to be given, and he cited 1 H. 7. 18 E. 4. and Co. lib. 8. Where the Obligor shall take notice at his peril, and so here because he takes upon him so to pay it: And it was said, that one Blackmore's Case was adjudged in the point, and he conceived also that this request afterwards is a sufficient notice. But Noy for the Defendant said, that he ought to give notice, or otherwise this mischief would ensue, that if he had not married her, and yet had demanded the Money he ought to pay it: and he said, that where an Act is to be

be done by a Stranger, the Plaintiff or Defendant ought to take notice thereof at his peril, as the Case E. 4. where a Man was bound to stand to the Award of J. C. he ought to take notice of the Award at his peril: but where it lies properly in the Consulane and notice of the Plaintiff, there he ought to give notice thereof to the Defendant, Co. lib. 5. Mallory's Case: If a Reversion be bargained and sold to J. S. the Bargainor shall have the Rent without Attornment; but if a Penalty be to be forfeited, he ought to give notice to the particular Tenant of the Grant, or otherwise he shall not take advantage thereof: and he cited a Case which was in 17 Eliz. Stephen Gurney's Case; Lessor for years, the Reversion is granted over for years by way of future Interest, to begin upon the death, forfeiture or determination of the first Lease; provided that if the Rent upon the second Lease be Arrear, that the Lessor may enter; the first Lessor surrender, a Rent-day incur, the second Lessor doth not pay the Rent, the Lessor shall not enter for a Forfeiture, because the first Lease determined by an Act which lies properly in the Consulane of the Lessor, and because he was to take advantage by it, he ought to have given notice thereof to the Lessee, and here he might have well given notice to the Defendant, for it lies properly in the Consulane of the Plaintiff.

The second Objection was, that here was an implied notice, because the Marriage was at the instance of the Defendant, which implies a notice.

Under favour this is no notice, for this is before the Marriage, but if no notice be given after the Marriage, then there is no notice.

But by Serjeant Davies, there is a sufficient Implication, and there is no need of notice in our Case; and see Co. lib. 8. Francis his Case, where they ought to take notice at their peril, and a Marriage is an Ecclesiastical Judgment of which he ought to take notice, and he was interrupted, for all the Justices went to the Parliament. And divers precedents were cited, that there need no notice to be given in this Case: And it was agreed that Judgment should be given for the Plaintiff: And in Trinity Term next following, Judgment was accordingly given for the Plaintiff.

The same Term in the same Court.

Sir George Reynoll's Case.

SI R George Reynoll Marshal of the Marshalsey of the King's Bench, What Bonds a brought Debt upon a Bond, the Condition whereof was, that the Defendant shall be a true Prisoner, and it was doubted whether the Bond were within the Statute of 23 H. 6. cap. 10. Sheriff or Marshal may take.

Doderidge, it is not to be understood by this Statute that a Sheriff, Gaoler or Marshal shall take no Bond, for if the Marshal hath a Man in Execution, and fear that he will escape, and he takes Bond of him, this Bond is good.

Jones, The intent of the Statute, that the Sheriff or Marshal shall not suffer Prisoners, to go at large, for that is within the Statute.

And it was ruled in the King's Bench, that the Marshalsey should be enlarged within the ed, and this shall be called within the Rule, and if the Marshal take a Bond to tarry there it is good, but if he suffer him to go at large, it is not good, what it is.

The same Term in the same Court, Intr. Hill. 1 Car. Rot. 124.

Sury *versus* Albon Pigot, and three other Defendants.

In an Action upon the Case for stopping his Water-course, the Plaintiff declares that 14 Octob. 22 Jac. he was possessed of the Rectory of M. in Berkshire, of which a Curtilage was parcel, and that in this Curtilage is and hath been time out of mind a Watering-place, for the watering of the Cattle of the Plaintiff and others, and for other necessary uses, and that a certain Water-course had time out of mind flowed from Mildford Stream to this Curtilage, and that this Water filled the said Pond; and further that the Defendant well knowing this, and intending to dam up the said Watering-course built a Stone-wall thereupon whereby the Water-course was stopped up, to the Plaintiff's damage of 20 l. and this was laid with a Continuando. The Defendant pleaded that 3 H. 8. the said H. 8. was seised of the Mannor of, &c. and of the said Rectory in his Demesnes of Exe, and of a certain piece of Land called the Hop-yard, lying between the said Watering-place and the said Stream, and by his Letters Patents granted this to William Box and his Heirs, by virtue whereof he was seised: Francis Searles entered upon him and was seised, and enfeoffed Pigot, 20 Jac. by virtue whereof he was seised, &c. and the three other justifie as Servants to Pigot, that they the said day and year filled up the said Water-course, as it was lawful for them to do: and that this is the same Trespass, &c. The Plaintiff demurs. And the Question is, whether the Unity of Possession of all in H. 8. hath extinguished the Water-course.

Whether Unity of Possession in several Lands, shall destroy a Water-course.

And by Dorrell for the Plaintiff, if it were of a Common, it is clear, that it is destroyed, because Common ought to be in another Man's Land, but not in our Case, for if one prescribe to have Warren, if he purchase the Land yet he shall have Warren, 11 H. 7. 25. there are two Houses, and the one prescribe that the other shall mend the Cutter, and afterwards they come to the hands of one Man, and then he alien one of them, this Unity shall destroy the mending of the Cutter.

Berd for the Defendant, that the Unity hath destroyed the Custom, 21 E. 3. 2. A way is but an Easement, yet by the purchase of the Land the way is extinguished, and also the Watering-course is not only an Easement, but a Profit, or Prender; and he cited Dyer 295. in case of an Inclosure, that the Inclosure is extinguished, but there is made a quare, and he cited 38 Eliz. in C. B. an Opinion, that by purchase of a Close the Inclosure is extinguished; a fortiori here because it is a Profit: And for the Case of 11 H. 7. it is by the Custom of London, but there is no Custom in our Case, and the Case of a Warren is not like to our Case, because a Man may have Warren in his own Soil; And in Michaelmas Term next the Case was argued again by Barkdale for the Plaintiff, that the unity of Possession in H. 8. had not extinguished the Water-course, and that the Terminus ad quem, and the Medium also being in one, had not extinguished nor destroyed it. And 1 Co. lib. 4. 26. Benedicta est exppositio quando res redimitur a destructione; The Law will not destroy things, but the Law will sometimes suffer a Fiction (which is nothing in rerum natura) ut res magis valeat. I confess that Profit appreender as Common, or Kent is extinguished by Unity of Possession for Common it appeareth in 4 E. 3. and Co. lib. 4. Terringham's Case: And for Kent it appeareth in 4 H. 4. 7. and in 21 E. 3. 2. it appeareth that a way is extinguished by unity of Possession, 3 H. 6. 31. Brook Nusance 11. for it is repugnant for a Man to have a way upon his own Land: But I conceive that our Case differs from the

the Case of a Way, and that for this reason; where the thing hath a Being and Existence, notwithstanding the Unity there it is not destroyed by the Unity, but the Water-course hath a Being notwithstanding the Unity, ergo, &c. I will prove the major Proposition by these Cases, 35 H. 6. 55, 56. Where a Warren is not extinct by the Feasiment of the Land, for I may hawk and hunt in my own Land as in another Man's, so the Warren hath Existence, notwithstanding the Unity, Dyer 326. Where the Queen was seized of Whaddon Chale, and the Lord Gray was Lieutenant there in Fr^e, and he and his Ancestors and their Keepers had by Prescription used to hunt wan-ning Daer in the Demesnes of the Mannor of S. adjoyning as in Purlieus: the Mannor of S. comes into the Queens hands, who grants this to Fortescue in Fr^e, with the Warren within the Demesnes, &c. it was holden that the Unity doth not extinguish the Purlieu, Dyer 295. Two Closes adjoyne, the one by Prescription is bound to a Fence, the Owner of one purchase the other, and suffer the Hedge to decay, and die, leaving two Daughters his Heirs, who make Partition: Quare whether the Prescription for the Inclosure be revived; true it is that it is made a Quare, but he saith, se the like Case, 11 H. 7. 27. of a Gutter which proves our Case, as I will shew afterwards.

For the Pins^r Proposition that the Watering hath Being, notwithstanding the said Unity, I will prove it by 12 H. 7. 4. A Precepe quod redditus de Land Aqua Co-operat' Mich. 6 Jac. Challenor and Moore's Case. An Ejectione firm^r, was brought of a Watering-course, and there resolved that it does not lie of it, because it is not firma, sed currit, but of Terra aqua co-operta, it doth lie. Also I will take some Exceptions to the Bar, there is no Title in the Bar for the Defendant Pigot, and so we being in Possession, albeit in truth we have no Title, yet he who hath no Title cannot oust us, neither can stop the said Water-course, and it is only shewn in the Bar that Searles entred and enfeoffed Pigot, but for any thing as yet appears the true Owner continued in Possession, 21 Jac. C. B. Cook against Cook in a Writ of Dower, the Defendant pleads an Entry after the Darrein Continuance, and doth not plead that he ousted him, and upon this the Plaintiff demurs, and there adjudged that it is no Plea in Bar, because he doth not say, that the Defendant entred and ousted the Tenant. 2. Exception, the Action is brought against four scil. Pigot, Cole, Branch and Elyman; and Pigot hath conveyed a Title from Searles, the three other Defendants justifie, but Pigot doth not say any thing but that Searles enfeoffed him, 7 H. 6. an Action of Waste is brought against many, one answers, and the other not, this is a Discontinuance: And for the principal matter. I will conclude with 11 H. 7. 25. Broo. Extinguishment 60. Two have Tenements adjoyning, and the one hath a Gutter in the others Land, and afterwards one purchase both, and then he alien one to one, and another to another, the Gutter is revived notwithstanding the Unity, because it is very necessary, and so he prayed Judgment for the Plaintiff. Bear for the Defendant: I in a manner agree all the Cases which have been put on the other side; and I conceive that the Water-course is not Scagnum but Servitium, which is due from the one Land to the other: It is but a Liberty, and therefore I agree Challenor's Case, which is but a Liberty that an Ejectione firm^r doth not lie of it, but Ejectione firm^r lies De stagno.

For the first Exception I answer and confess, that to alledge an Entry af-
ter the Darrein Continuance, without alledging an Ouster of the Tenant,
cannot abate the Writ, for the Defendant may enter to another intent as
appeareth in the Commentaries, and with the Assent of the Tenant; But
here it was alledged that a Feoffment was made and a Livery which implies
another.

For the matter in Law, I conceive that the Water-course is extinguished,
and it may be compared to 21 E. 3. 2. The Case of a way which is extinguishe-
ed by Unity of Possession, Hill. 36 Eliz. Rot. 1332. Hemdon and Crouch's
Case

Case. Two were seised of two several Acres of Land, of which the one ought to inclose against the other, one purchase them both, and lets them to several Men, and there the Opinion was, and adjudged accordingly, that the Inclosure is not revived, but remains extinguished, 39 Eliz. Harrington's Case, the same thing resolved, and albeit in Dyer 295. is a quare, yet the better Opinion hath been taken according to these Resolutions. Hill. 4 Jac. Jordan and Ayliffe's Case, when one had a Way from one Acre to another, and afterwards purchased the Acre upon which he had the Way, and afterwards sold it, and in that Case the Opinion of three Justices was that the Way was extinguished; also 11 H. 4. 50. and 11 H. 7. 25. probe this Case, for the said Case is compared to the custom of Gavel-kind and Butteffou English, and there the quare is made whether by the custom it be revived, and if it be a Custom which runs with the Land, the Unity of Possession doth not extinguish it, Colib. 4. Terringham's Case, and 24 E. 3. 2. Common Appurtenant is destroyed by Unity of Possession, and yet it is a thing of common Right, but a Water-course being a thing against common Right, a Fortiori it shall be extinguished. Now I will take some Exceptions to the Declaration.

1. Because he hath laid a Prescription for a Water-course, as to say, that it was belonging to a Rectory, to which, &c. and this is a good Exception, as appears by 6 E. 6. Dyer 70. Ilhom's Case, where Exception was taken, that before his Prescription he doth not say, that it was Antiquum parcum, which Exception (as it is there laid) was the principal cause that Judgment was given against him, and also as the Case is here, it ought to be a Rectory inappropriate, and this cannot be before the time of H. 8. which is within time of memory, for before the said time no Lay-person could have a Rectory inappropriate, and therefore I pray Judgment for the Defendant.

Barksdale laid, that the Prescription is well laid, and that he would prove by 39 H. 6. 32. and 33 H. 6. 26. and per curiam the Prescription is good enough, and albeit it is not laid, that it is Antiqua Rectoria, yet it is well enough, Mich. 1 Car. at Reading Term in Brock and Harris's Case, he doth not say, that it is Antiquum Mesuagium, and yet resolved good.

Doderidge, the Case of 6 E. 6. differs in this point from this Case, for a Rectory shall always be intended ancient, and so is not a Park, for this may be newly created: and he put this Case; suppose I have a Mill, and I have a Water-course to this in my own Land, and I sell the Land, I cannot stop the Water-course.

Crew Chief Justice seemed of Opinion that the Prescription was gone, and that the better Opinion in Dyer, 13 Eliz. hath always been that the Inclosure is gone by Unity of Possession, but yet the Water-course is matter of necessity.

Doderidge and Whitlock, the Way is matter of Election, but the Course of Water is natural.

Jones Justice, There is great difference between a Way and a Water-course as to this purpose, for admit that this Water-course, after that it had been in the Curtilage of the Plaintiff, goes further to the Curtilage of another, shall not that other have the benefit of this Water-course notwithstanding the Unity of Possession? I think clearly that he shall.

Doderidge, My Opinion is, that the Water-course is not extinguished by the Unity of Possession: but some conceived that he had declared his Opinion in terror to the Defendant: And afterwards the same Term Barksdale for the Plaintiff laid, that he had agreed the Case before, and therefore would now only endeavour to answer some Exceptions which had been taken to the Declaration.

1. Exception hath been that no Prescription or Custom is made for this Water-course, but only that Currere solebat & consuevit. But I conceive that the Declaration is good notwithstanding this, because the Plaintiff here doth not

not claim an interest in the Water-course, but in the Land in which, &c. and therefore it is good, and this appeareth by 12 E.4.9. the Prior of Lantones Case in a prescription in a Parker overt generally, and the reason there was, because he was a stranger, as in our case he is, and this pleading appeareth also to be good by Cooks Book of Entries, 18. Smiths Case, which was entred 9 Jac.Rot.366. in this Court. 2. Exception was, because it is not said, that it was Antiqua Rectoria. 3. Exception, because it doth not appear that he was a spiritual man to whom the Demise of the Rectory was made. 4. Because it is not said, that the Water-course Ad predict. Rectoriam pertinet. 5. Because the Water-course is alledged to be for his customary Tenants of the said Rectory, and this is not good, as appeareth by 21 Eliz.Dyer, 363. Prescription, Pro quilibet customari. Tenente, is not good: but I conceive that this case is not our case, for here is Customarius tenens Rectorie, and there it is agreed that Quilibet customarius tenens Maner. had been good: And the plea in Bar hath salved these objections, and therefore he prayed judgment for the Plaintiff.

Jeremy for the Defendant. And first for the matter in Law, it seemed to him that by the unity of possession the Water-course is extinguished, and the Water-course may well be compared to the case of the way, for as a way is a passage for men over the land, so water hath passage upon the land, and a way is extinguished by unity, as appeareth by 21 E.3.2. 11 H.4.5. 21 Ass. and Davies Reports 5. and in 4 Jac. Jordan and Case it was the better opinion that a way was extinguished by unity of possession; true it is, that there Popham chief Justice put the difference, where the way is of necessity and where not, for where the way is of necessity there it shall not be extinguished: This case hath been compared to the case of a Warren in 35 H.6. but I conceive that the cases are not alike, because a Warren is a mār liberty, 8 H. 7. 5. A man may have a Warren in his own Land, and Co.lib.7. Buts Case by a Feoffment of Land, a Warren doth not pass, but this Water-course hath its original out of the Land, and this case cannot be compared to an ancient Water-course running to a Mill, for notwithstanding the unity it shall pass with the Mill, for otherwise it shall not be Molendinum aquatum, so that the water there is parcel of the thing, and so of necessity ought to pass with the thing, but here it doth not appear that it is a Water-course of necessity, and for any thing that appeareth, it may be filled with another Water-course: Also I conceive that the Declaration is not good. 1. Because neither prescription nor custom is laid for the Water-course, and it appeareth in Co. Book of Entries, Holcome and Evans case, and the old Book of Entries, 616, 617. Mich. 1. Car. Rot. 107. Turner and Dennies case in this Court, in trespass for breaking his Close, &c. the Defendant justified for a way, &c. and that he was possessed for years, and for him and his Occupiers had a way over the Land, the Plaintiff demurred, and resolved that the prescription is not good. 2. The Declaration is insufficient being an action upon the case for the stopping of a Water-course, and it is not Vi & armis, nor Contra pacem, Co. lib. 9. 50. the Earl of Shrewsburies case, when there are two caules of an action upon the case; the one Causa causans, the other Causa causata, Causa causans may be alledged Vi & armis, for this is not the immediate cause of the action, but Causa causata F. N. B. 86. H. and 92 E. in the end of the Writ of action upon the case shall be Contra pacem. 3. Also he hath prescribed for the Tenants of the Rectory, which is not possible, for no Lay-man could be Tenant of a Rectory, or of Tithes before the Statute of H. 8. and therefore I pray Judgment for the Defendant.

Whitlock chief Justice conceived that the Declaration was good, and the bar is naught, both for the form and matter: the question here is of Aqua profluens, and I conceive that there needs no prescription or custom in this case, for water hath its natural course, and as is observed by Brudnel in 12 H. 8.

Natura sua descendit, it may be called Usu captio, or Usage, and he conceived that the Action upon the Case very well lies in this Case, like to the Case where a Man hath an House and Windows in it, and another erect a new House and stop the Light, then I may have an Action upon the Case; but true it is, that I shall not only count for the loss of the Light, but also I ought to prescribe that time out of mind Light hath entered by these Windows, Sec. lœ 7 E. 3. If there be a School-master in a Town, and another erect a new School in the same Town, an Action upon the Case doth not lie against him, because Schools are for the publick benefit, and every private Man may have a School in his House. And for the Exception, that a Lay-man cannot be possessed of a Rector, I conceive that the Declaration is good notwithstanding, for a Lay-man may have a Rector by Demise.

And for the Plea in Bar, it is not good for the Form, because that Scarles entered and enfeoffed Pigot, and it is not said, that he entered, and Expulit, and if a Man enter and make a Feoffment, the Owner being upon the Land the Feoffment is void, and therefore an actual Dower ought to be shewn: And for the matter in Law, he conceived that the Bar was nos good, for by the Unity of Possession the Water-course is not extinguished, and yet I agree the Cases of a Way and Common upon the differences of Rights which are put in Bracton, lib. 4. 221. These are called Servitudes, as jus eundi, fodendi, hauriendi, &c. sunt servitutes quas prædia ex quibus exeunt aliis prædiis debent, and are called Servitudes prædiale, and this began by private Right, to wit, by Grant or Prescription.

A Way or Common shall be extinguished, because they are part of the Profits of the Land, and the same Law is of Things also, but in our Case the Water-course doth not begin by the consent of Parties, nor by Prescription, but Ex jure naturæ, and therefore shall not be extinguished by Unity: A Warren is not extinguished by Unity, because a Man may have a Warren in his own Land, and in the Case of 11 H. 7. the Garter was not extinguished only by the Unity of Possession, but there also appeareth in the Case that the Pipes were destroyed, whereby it could not be revived, and although the Book of 13 Eliz. Dycr. 295. Two Closes adjoin together, the one being by Prescription bound to a Fence, the Owner of the one purchase, the other dies, having issue two Daughters, who make Partition, it is a quære whether the Inclosure be revived, yet I conceive clearly, that by Unity of the Possession the Inclosure is destroyed, for Fencing is not natural, but comes by Industry of Men, and therefore by the Unity it shall be gone, and so briefly with this diversity he concluded that where the thing hath its Being by Prescription, Unity will extinguish it; but where the thing hath its Being Ex jure naturæ, it shall not be extinguished, and therefore the Plaintiff ought to have Judgment.

Jones Justice agreed, that the Declaration is good, and that the Bar also is good in manner, but for the matter in Law it is not good.

As to the first Exception to the Declaration, I conceive it is good, albeit there wants a Prescription, and this is the ordinary way of pleading as appears in Co. lib. 4. Luttrell's Case, and in all the Presidents before cited.

2. For the Exception Vi & armis, he conceived this difference, where the Act is a Trespass and a Plurality, there it may be laid to be Vi & armis, but if it be a Plurality only and not a Trespass, it is otherwise, as if I have a way over another Man's Land, if a Stranger dig in the Land so as I cannot have the way, now because it is a Trespass to the Owner of the Soil, in my Action upon the Case against a Stranger, I may have Vi & armis, but if the Owner stop the Way, there Vi & armis shall not be in my Action upon the Case.

For the third Exception, because he doth not say, Ad Rectoriam spectantem, but I conceive that it shall be intended ad Rectoriam impropriat, and so it appeareth.

4. Where it is said, Watering-course for his Tenants, I conceive it is good enough, being in an Action upon the Case where Damages only are to be recovered: That the Bar also is good in form, for although the Tenant here be a Dilector, yet it is a good Bar, for it matters not whether he hath a Title or no, if the Water-course be extinct by the Unity: for the matter in Law, he conceived that the Unity of Possession had not extinguished the Water-course. A Man hath things out of another Man's Land, either by Grant as a Heignory, Rent, Common, &c. and these are extinguished by Unity, &c. and the reason is, because one who hath Interest as Owner of the Land, cannot have a particular Interest in the same Land also. Or by Prescription, and those things are extinguished by Unity of Possession also, and not only for the first reason because he is Owner of the Land, and so cannot have a particular Interest in the same Land also, but also because that by the Unity the Prescription fail. And for the Case in Dyer, 13 Eliz. I conceive that by the Unity the Inclosure is gone, and so it was resolved in 37 Eliz. for every one is not bound to inclose: For the Case of the May, I will suspend my Opinion concerning it, because Clark and Lamb's Case is now depending touching it in the same Point.

But now for our Case, it differs from the other Cases, for the Prescription here is in another manner than is made for Common, for it shall be pleaded either as appendant, or appurtenant, but Currere solebat is only in this pleading, for here no Interest is claimed, but in the other Cases an Interest is claimed: In this Case the Land remains as it was before, and therefore the Unity will not extinguish it: and if such an Unity by Construction of Law should extinguish Water-courses, it would be too dangerous: for suppose that a Man hath a Water-course from Thames to his House in Lambeth, if he purchase a parcel of Land in Hendley; now because that the Thames come by the same Land, his Water-course shall be extinguished. Also suppose that the Water-course after it hath been in the Curtilage of the Plaintiff, goes into another Curtilage, is it reason that by this Unity the second Man shall lose his Water-course: without doubt it is unreasonable. And the Case of 11 H. 7. of the Gunter, warrants this Opinion, and therefore the Plaintiff ought to have Judgment.

Doderidge Justice, I conceive no great difficulty in the Case; for the Exceptions to the Declarations they are not material.

1. That there wants Prescription or Custom, I conceive that it is good enough, for here are the words of Currere solebat & consuevit, and Consuevit is a good word for a Custom.

2. That a Lay-man cannot have a Parsonage; true it is, that a Lay-man cannot be a Parson, but he may have a Parsonage, for he may be Lessor of it, which appeareth many times in our Books.

3. That it is not alledged to be Vi & armis, this is the most colourable Exception, and the Case and Rule cited out of Co. lib. 9. the Earl of Shrewsbury's Case is good Law, but it is impossible to plead Vi & armis in this Case, for the Unity was in H. 8. and the Wrong is supposed after the Severance, and it is supposed to be done by the Owner of the Land, and a Man cannot do a thing upon his own Land Vi & armis.

4. Because it is not alledged to be an ancient Rectory: I conceive it need not, because the Law presumes all Rectories to be ancient, the Patronages whereof are gained Ratione fundi, fundationis, vel dotationis.

5. Because he doth not say, that Pertinet ad Rectorianam: But he hath said a thing which amounts to as much; for it is said, that in the Rectory was a certain Curtilage in which there is a Watering-pond, and the Curtilage is part of the House, and therefore he need not say, that it belongs to the House. For the Bar I conceive that it is good for the Plaintiff: A Man makes a Feodement of Land, the Owner of the Land being present at the same time, no-

thing works by the Livery, for the reason before given by Jones. For the matter of Law he conceived that the Unity of Possession doth not extinguish the Water-course, and that for two reasons.

1. For the necessity of the thing.

2. From the nature of the thing being a Water-course, which is a thing running.

1. For the necessity, and this is the reason that Common Appendant by the Unity of Possession shall not be extinguished, for it is appendant to ancient Land-hive, and Cain Arable Land, which is necessary for the preservation of the Commonwealth; and as in this Case there is a necessity of Bread, so in our Case there is a necessity of Water: And for the Case of a Way Distinguendum est, for if it be a Way which is only for Easement it is extinguished by Unity of Possession, but if it be a Way of Necessity, as a Way to Market or Church, there it is not extinguished by Unity of Possession, and accordingly was the Opinion of Popham Chief Justice, which I take for good Law, and the Case of 11 H. 7. 25. is a notable Case, and there a Reason is given why a Gutter is not extinguished by Unity of Possession, because it is matter of necessity.

2. From the nature of Water, which naturally descends, it is always current, Et aut invenit aut facit viam, and shall such a thing be extinguished which hath its Being from the Creation. Co. lib. 4. Lutrel's Case, a Mill is a necessary thing, and if I purchase the Land upon which the Stream goes which runs to this Mill, and afterwards I alien the Mill, the Water-course remains. So if a Man hath a Dye-house, and there is a Water running to it, and afterwards he purchase the Land upon which the Water is current and sell it, yet he shall have the Water-course. Dyer: Dame Browns Case, and the principal Case in Lutrel's Case, a Fulling-mill made a Water-mill, this shall not alter the nature of the Mill, but yet it remains a Mill, so the Water hath its course notwithstanding the Unity, and he concluded for the Plaintiff.

Crew Chief Justice, I agree that the Declaration is good, and also that the Bar is good for the manner, but for the matter in Law, I conceive that it is not good. In our Law every Case hath its Stand or Fall from a particular Reason or Circumstance: for a Warren and Tythes they are not extinguished by Unity, because they are things collateral to the Land: And for the Case of 13 Eliz. in Dyer, of an Inclosure; I conceive that by the Unity the Inclosure is destroyed, for the Prescription was interrupted, and in Day and Drake's Case, 3 Jac. in this Court it was adjudged that in the same Case the Prescription was gone; It may be resembled to the Case of Homage Ancestrell, 57 E. 3. Fitzherbert Nusans: And for our Case it is not like to the Cases of Common, or a Way, because the Water-course is a thing natural and therefore by Unity it shall not be discharged; also there is a Linement out of which every Man shall have a benefit, and therefore he concludes that Judgment should be given for the Plaintiff; And Judgment was commanded to be entered for the Plaintiff.

The same Term in the same Court.
Wesden versus Vesey.

An Action of Debt was brought by Welden Sheriff of the City of Coventry against Vesey, upon the Statute of 29. Eliz. cap. 4. and declares, that it is provided by this Statute that no Sheriff or Minister, &c. shall take for an Execution, if the sum doth not exceed 100 l. but 12 d. for every 20 s. and being above the sum of 100 l. 6 d. for every 20 s. and shewing that whereas the said Vesey had Judgment against one in an Action of Debt, that the Plaintiff by virtue of a Capias directed to him, took the Body of the said Person condemned, and that it was delivered to the Plaintiff, and that he for levying of the Money had brought this Action.

The Defendant by way of ~~Answer~~ said, that it is provided by this Act that it shall not extend to Executions in ~~Actions~~ Corporate, and that this was within Coventry, and so demurred upon the Declaration.

And Whitwick argued for the Plaintiff; two things are considerable in this Case.

Whether where the sum exceeds 100 l. the Sheriff shall have 12 d. for every 20 s. of the 100 l. and 6 d. for that which is over, or 6 d. only for every 20 s. for all the sum.

2. Whether this Statute extend to Judgments in Towns Corporate. For the first, the Letter of the Statute is clear that he shall have 12 d. for the first 100 l. and 6 d. for the residus, for the Statute is, that if it be above 100 l. that he shall have but 6 d. therefore if it be under 100 l. he shall have 12 d. for every 20 s. And the meaning of the Statute is plain also, for otherwise the

Whether a Sheriff, or &c. shall have 12 d. in the pound for the first 100 l. and 6 d. for the rest upon an Execution.

Sheriff shall have a lesser Fee where it is above 100 l. (as where it is 199 l.) than he shall have for 100 l. but this was not the intent of the Statute, but the greater the Execution, the greater the Fee: It was adjudged in one Gore's Case, 10 Jac. that an Action of Debt lies upon this Law, Pasch. 14 Jac. Rot. 351. Bole and Todderson Sheriffs of the City of London, brought Debt against Nathanael Michell for Execution of 400 l. for 12 l. 10 s. scil. 5 l. for the first 100 l. and 6 d. for every 20 s. after: But I confess that the principal Question there was, whether an Action of Debt lies for the Dency, and it was resolved that it did, any Judgment was given for the Plaintiff.

2. To the Proviso, that this doth not extend to Fees in a Town Corporate, whether this extend to Executions which go out of Judgments in this Court, or in the Common Pleas into Towns Corporate. The Statute shews that before that time the Sheriff had taken great Fees, which the Parliament considering, restrained them to a Certainty: The words of the Proviso are general: Provided that this Act shall not extend to any Fees to be taken for any Execution within any City or Town Corporate, and although the words be general, yet the Exposition shall be according to reason, as it is said in Fulmerston and Steward's Case in Plow. Exposition, shall be made against the words, if the words be against reason, 5 H. 7. 7. 38 H. 3. Broo. Livery 6. The King shall have primer Seisin of all Lands of his Tenant which he holds of him in Capite, but if one holds of the King in Capite, in Socage, he shall pay no primer Seisin to the King, and this Statute shall have this intendment, that this Proviso shall extend only to Executions upon Judgments given in Cities and Towns Corporate, and not where Judgment is given in this Court, or the Common Pleas, and Executions are only there, and this seems to be a reasonable Construction; Executions in Towns Corporate, to wit, Executions

Executions upon Judgments given in Towns Corporate. If the Sheriff make Execution at the Town side he shall have for his Fæs as the Statute limits, and therefore he shall have it if within the Town, and if this should not be so, this mischief would ensue, that presently when an Execution issues out against a Man, he will shelter himself in a Town Corporate, as in a Sanctuary, and the Sheriff will not do Execution there, because he shall not have so great a Fæs for doing it as if it were in another place, and so Execution (which is the life of the Law) shall be undone.

Jeremy for the Defendant; and first, if the sum exceed 100 l. he shall have but 6 d. for every 20 s. of all. It is considerable that at Common Law the Sheriff ought to do Execution freely without any Recompence. In Booth and Sadler's Case lately in this place, an Action upon the Case was brought by a Wayliff, that whereas a Warrant for taking such a Man was directed to him, the Defendant promised him 40 s. for his pains, he took the Man and brought an Action for the 40 s. and it was agreed that he should not have it. The Law abhors that great Fees shall be given for Executions, Co. lib. 3. 7. in Heydon's Case: In the Exposition of the Statute three things are considerable.

1. What the Common Law was before the making of it.

2. What the mischief was at the Common Law.

3. The Remedy which the Statute gives.

4. The true Reason of the Remedy. The Common Law was, that the Sheriff shall not take any Fæs for Execution, Ergo now he shall take as small a Fæs as may be, because this is highest to the Common Law: And the first words are declarative what Fees he shall take; and the subsequent words affirmative what Fees they may now take, to wit, where the sum doth not exceed 100 l. 12 d. for every 20 s. 14 Jac. It was objected, that the Sheriff is not bound to do Execution before he hath his Fæs, and then it was resolved that he might have an Action of Debt, and so it seems that the Party is not bound to give levying Money before that the Execution be done, and otherwise, the Party Plaintiff may be at great mischief if the other be not taken: And it hath been agreed lately in the Common Pleas, that if the sum exceed 100 l. he shall have but 6 d. for every 20 s. And as to the second Point, he endeavoured to maintain that the Proviso extends to Executions in Towns Corporate, although the Judgments upon which the Executions issue are given in other Courts, and this is the constant practise of the City of London.

The Judges delivered their Opinion, with a Protestation, that they might recall them, if afterwards better reason appeared.

Crew Chief Justice was of Opinion that he shall have but 6 d. for every 20 s. if the sum exceed 100 l. and the sum shall not be divided, but if the sum be under 100 l. then 12 d. for every 20 s. and this is the reason of the Law.

And for the second Point, although the Judgment be given in the superior Court, yet if the Sheriff does Execution there, he shall have his levying Money, and this is within the intention of the Proviso.

Doderidge Justice, the first Question is upon the Exposition of the Statute, the second upon the Proviso: For the first two Expositions may be made as hath been remembred, then we will enquire of the Interpretation: This Statute was made for the benefit of Sheriffs, that as they are in hazard by taking of Men, because many times resistance was made. 2. When the Sheriff had taken a Man, and in the carriage of him to Prison he had escaped, an Action upon the Case did lie against the Sheriff, and when he had him in Prison, he ought to have great care in keeping of him, for an Action lies against him if he escape: and therefore although on the one side there was a great mischief by reason of great Fees that the Sheriff took for Execution; so on the other side, the Law tended Sheriffs in respect of the hazard and care which they had of Men in Execution, and therefore the Law in an indifferency provides that the Sheriff shall have a good Fee for Execution, and also it provides against

against his Execution, and so it is indifferent between the Oppression of the Sheriff and Covetousness, and we are not to judge according to the intent, but according to the equity of the Law, for Equality to prevent the Covetousness of Sheriffs and the Oppression of the People; then in this Case, if he shall have but 6 d. for every 20 s. for 200 l. he shall have no more for Execution of 200 l. than if it were 100 l. But I think this was not the intent of the Act.

For the second Point, I take it that this Statute did not extend to Huits within Towns Corporate, and Executions upon them, for they are not at any great trouble for doing of Execution within their Towns, nor hazard: But if a Sheriff does Execution in a Town Corporate, then he shall have according to the Statute, for it may be that the Prison is far distant. And I upon the sudden conceive that this Proviso extends only to Towns Corporate, which are Counties.

Jones Justice, That Questions have been made upon this Statute.

1. For the nature of the Action which the Sheriff is to have upon this Statute, and for that it hath been many times resolved that he shall have an Action of Debt, for when a Remedy is given by a Statute, and no Action is given by the same Statute whereby the Penalty shall be recovered, there he shall have an Action of Debt.

2. Who shall have the Fee when the Sheriff makes a Warrant to a Bayliff of a Liberty, the Bayliff of the Liberty or the Sheriff?

The second Branch of the second Question is, that when one Sheriff makes the Extent, and another Sheriff makes the Liberate, who shall have the Fee?

3. The third Question hath been in debate in the Common Pleas, and there was some of Opinion that if the sum be above 100 l. and under 200 l. that the Sheriff shall have 12 d. for every 20 s. of the first 100 l. for otherwise the Sheriff shall have a less for Execution of 199 l. than he shall have for 100 l. But if it be above 200 l. he shall have 6 d. ab initio.

My Opinion on the sudden is, that for every 20 s. of the first 100 l. he shall have 12 d. and for the residue he shall have 6 d. for every 20 s. and the other shall not be altered.

And for the second Point, I hold that this Proviso extends only to Judgments originally commenced in Towns Corporate, and not to Executions upon Judgments given in superior Courts, for then the Sheriff does Execution as an Officer to these Courts: And the Sheriff of the County is at as great pains, as if he were Sheriff of another County, and shall not be bound by the Proviso.

Whitlock Justice was for the Plaintiff in both the Points, to wit, that the Sheriff shall have 1 s. for every 20 s. of the first 100 l. and 6 d. for every 20 s. of the residue. And by him the Sheriff may refuse to do Execution until the levying money be paid to him.

And for the second Point, the Sheriff of the County of the City is not within the Proviso, but shall have the Fees by the Statute provided, as well as the Sheriff of the County shall have, for the words are general, and the Exception goes to all Towns Corporate and Cities, but doth not say Cities which are Counties, and therefore this Sheriff is within the benefit of this Law: And in Michaelmas Term next following the Case was moved again by Whitlock for the Plaintiff, and he said that he would not speak to the second Point, because the Court had delivered their Opinion, that the Proviso in the Statute, that this shall not extend to Executions in Towns Corporate, it is to be intended of Executions in Towns Corporate upon Judgments there given: But for Executions there upon Judgments given in this Court, or any other superior Court, the Sheriff shall have such Fees as are limited by this Statute. And the Court said to him that they were agreed of it.

And

And as for the first point, he conceived that the Sheriff shall have 12 d. for levying of every 20 s. of the first 100 l. and 6 d. of every pound more, and this appears clearly by the Letter of the Statute: And the Case in Mich. 19 Jac. in C. B. between Emson and Bathurst doth not make against it, for the resolution of the said case was upon other matters: The case being a man bound in a Statute of 120 l. the Sheriff extends, and before the Liberate takes double Bond of the party for payment of his Fees, and afterwards brought Debt against the party, who pleads the said matter in Bar, and the Statute of 23 H. 6. cap. 10. And in the case were three points.

1. Whether the Sheriff may take a double Bond for the payment of his Fees, and it was resolved that the Bond was void, for the Sheriff might have Debt upon the Statute for his Fees.

2. Whether the Sheriff shall have his Fees before the Liberate, and resolved that he shall not.

3. Was this very question, and two Justices were against one, that where the sum exceeds 100 l. he shall have but 6 d. for levying of every 20 s. of the first 100 l. But the Judgment was given upon the other points. All the Court seemed to be of opinion that he shall have 12 d. for every 20 s. of the first 100 l. and 6 d. for every 20 s. of the residue.

The same Term in the same Court.

Awdley *versus* Joy.

Awdley being put out of the Town-Clarkship of Bedford, moved for a Writ of Restitution to the place, and it seemed to Doderidge Justice, that the Justices of this Court have power to grant restitution in this case, and he cited a Case in 16 Eliz. in this Court, where restitution was granted in such a Case, and 43 Eliz. by warrant of Fennor Justice, a Writ of Restitution was granted.

One who was Town-Clark of Boston for life was made Alderman and put out of his Clarkship, and was restored. This Court hath power not only in judicial things, but also in some things which are extrajudicial. The Mayor and Commonalty of Coventry displaced one of the Aldermen, and he was restored; And this thing is peculiar to this Court, and is one of the flowers of it.

Crew chief Justice, doubted whether restitution could be made to Awdley, or no, because the Office was granted to him in Reversion, when it was expectant upon an Estate for life, and when the Officer for life dyed, Joy was elected, and he said, that all the said Writs remembred are, where he had once possession.

Whitlock Justice, in the case of one Constable, 10 Eliz. It was resolved that this Court hath power to grant Restitution in such a Case, where he was put out of his Office: And by Jones Justice, this Court hath power to grant Restitution, and he remembred, one Micklecot's Case: And Noy being of Counsel with Awdley said, that there are Presidents to prove this in the times of E. 2. E. 3. and H. 6. And it was said by the Justices that they are the chief Conservators of the Peace within the Realm, and therefore have power for the preservation of the Peace in such factious Towns to grant restitution.

A Writ of Restitution to a Town-Clark being ousted of his Office.

The same Term in the same Court.

Dabborne *versus* Martin.

THomas Dabborne brought an Action upon the Case against Martin for these words, Thou art a Knave of Record, and a forgering Knave: And it was argued by Jeremy for the Defendant, that the words were not Actionable, for a Knave signifies a Male-Child, so that it is no more than to say, Thou art a Male-Child of Record: And for forgering Knave the Action will not lie, for Forger is a general word, and may be applied to divers Trades, as forgering Smith, forgering Gold-smith; and when he called him forgering Knave, there was no Communication of his Office, 18 Jac. Sir William Brunskill brought an Action upon the Case, and declared that he was well descended, and was a Gentleman of the Chamber to Prince Henry, and he brought an Action for these words, Thou art a Cosenor, and livest by Cosenage, and adjudged not Actionable, Coke, lib. 4. 16. Action upon the Case doth not lie for these words, Thou art a corrupt Man, if there were no Communication touching his Profession; And it was argued for the Plaintiff that the words were Actionable, for it lieth for these words, Thou art an Out-putterer, if they were spoken in Northumberland where they are understood, but not here, because they have no signification: And the words here are special and shall have reference to his Office, and shall have such an Interpretation as is now used, and now Knave hath no signification of Male-Child.

Jones Justice said, that if one saith, that such an one is a corrupt Judge, Action lies, or if one saith of a Clark, that he is a forgering Clark, Action lies: And in 28 Eliz. the Opinion of Justice Fennor was, that for these words (Thou hast forged my Father's Will) Action lies.

Crew said, that he did not understand the word (Forgering) but for calling one Knave of Record, Action lies. And Doderidge Justice said, that he never gave way to these Actions upon the Case for words: And no Opinion was given this day.

The same Term in the same Court.

Goodwin *versus* Willoughby.

Goodwin brought an Action upon the Case against Joan Willoughby wife of Thomas Willoughby, and upon non Assumpsit pleaded, it being found for the Plaintiff, it was moved in Arrest of Judgment. 1. That the Plaintiff shew that Thomas Willoughby was indebted upon Account, and doth not shew that Joan Willoughby is Executrix or Administratrix, and yet that she promised to pay, whereas in truth she hath no cause to pay, for there is no Consideration, and so Nudum pactum.

Jeremy for the Plaintiff: for the first, because it doth not appear for what cause he accounted; I answer, that this is but a mere Conveyance: And for the second, that she does not suppose that the Feme is Executrix, &c. But here is a good Consideration, which is, that she shall not sue or molest, and that he gave day for Payment, this is a sufficient Consideration. But Stone of Council with the Defendant said, that the first is the Ground of the Action, and therefore he ought to shew for what he accounted.

Crew Chief Justice, two Exceptions have been taken, 1. For the alledging the manner of the Account, which I conceive is good enough, and he need not shew the cause of the Account: And as to the second, because it doth not appear that she is Executrix, or Administratrix, and so no Consideration, and so no Assumpſit: But here she assumes to be Debtor and makes a Promise to pay, which is an Acknowledgment of the Debt by inference, and therefore he conceives that the Assumpſit was good.

Doderidge Justice, for the first it is good enough, yet Cum indebitatus existit is no good Assumpſit, but here he shews a ſpecial way of Debt, and it would be long and tedious to describe his Account. For the ſecond there is no cause of Action, because it doth not appear that ſhe is Executrix or Administratrix, or Executrix of her own Wrong.

Where Forbearance without cause of Action, is no Ground of an Assumpſit.

If I ſay to one do not trouble me, and I will give you ſo much, this is not Actionable, for there ought to be a lawful Ground, and for this cause the Declaration is void, for it is only to avoid moleſtation: Give me time, &c. this is no good Assumpſit, for Forbearance is no Ground of Action where he hath no caule to have Debt.

Jones Justice agreed in the firſt with them, because a general Action upon the Case ſufficeth, and in truth it is but an inducement to the Action; but for the other part he doubted, and he cited one Withypool's Case, an Infant within Age, promised to pay certain Money, he makes an Executor and dies within Age: the Executor ſaith to him to whom the promise was made, forbear and I will pay you, and there an Action upon the Case did lie againſt the Executor upon this promise, and yet it was a void Contract, but there was colour of Action, forbear till ſuch a time, now the other hath lost the advantage of his Suit: But he gave no Opinion.

Crew, It is a violent presumption that he is indebted: But by Doderidge here is no colour to charge her, but only by inference that ſhe is Executrix.

If a Stranger ſaith, forbear ſuch a Debt of J. S. and I will pay it, it is a good Consideration for the loss to the Plaintiff, and in this Case it appears not that there is any cause, and Broom Secondary ſaid, that Withypool's Case before cited was reverſed in the Exchequer-Chamber.

Jones, If an Infant makes a Promise, it is void, and he may plead non Assumpſit, which Doderidge did not deny: But upon his Obligation he cannot plead Non est factum, for he ſaid that he shall be bound by his hands, but not by his mouth.

The ſame Term in the ſame Court.

Drope *versus* Theyar.

In a Debt by Drope againſt Theyar an Inn-keeper upon Issue joyned, and a Writ for the Plaintiff, Bolſtrede moved in Arrest of Judgment for the Defendant, and the matter was, that one Rowly who was Servant to Drope, lodged in the White Hart at S. Giles, and there had certain Goods of his Masters which were stolen from him in the night, and Drope the Master brought an Action thereupon, and it was moved by Bolſtrede that the Plaintiff was without Remedy.

1. Because it was in an Inn in London, for the Register 105. Quando quis depredatus euns per patriam, which (as he ſaid) could not be extended to an Inn in London.

2. It ought to be an Inn, as Inn-keeper.

3. He ought to be as a Guest lodging, and this appeareth in Culey's Case, in 5 Jac. in Celly and Clark's Case (which was entred, Pasch. 4 Jac. Rot. 255.) It was adjudged that where the Guest give his Goods to his Host to deliver to him thre days after, and the Goods are lost, that an Action is not maintainable against the Inn-keeper for them, and this was in an Inne in Uxbridge: And in one Sands Case, where the Guest came in the morning, and his Goods were taken before night, he shall have an Action against the Inn-keeper.

4. The Goods ought to be the Goods of the Party who lodgeth there, for the words are *Ita quod hospitibus damna non eveniunt*, and here the Master who brought the Action was not Guest: But admit the Master shall have the Action, yet he ought to alledge a Custom that the Master shall have the Action for the Goods taken from his Servant, Trin. 17 Jac. Rot. 1535. Bidle, and the Master brought an Action for Goods taken from the Servant, and there it was resolved that he ought to conclude that *Pro defectu, &c.* and apply the Custom to him being Master: See Coke's Book of Entries, 345. And that a Custom, that for other Mens Goods in the custody of Guests, the Owner shall have an Action against the Inn-keeper if they be stolen.

Obj. This is the Common Law, and therefore ought not to be alledged.

Answ. Where a Man takes upon him to shew a Custom, he ought to shew it precisely, he cited Heydon's Case, Coke, lib. 3. 28 H. 8. Dyer 38. And it was said for the Plaintiff that Goods are in the possession of the Master which are in the possession of his Servant, and so here the Master might have had Action well enough, 8 E. 4. my Servant makes a Contract, or buys Goods to my use, I am liable, and it is my Act.

By the Court an Inne in London is an Inne, and if a Guest be robbed in such an Inne, he shall have Remedy as if he were Euns per patriam: But the chief Point was, whether the Master shall have the Action in the Case where the Servant lost the Goods, and by Jones Justice in 26 Eliz. in C. B. upon the Statute of Hue and Cry it was resolved that if the Servant be robbed the Master may have the Action, and so by him shall it be in this Case. Doderidge Justice, the Servant may have the Action also: If the Servant be robbed of Wares, the Master or Servant may have an Appeal, 8 E. 2. Tit. Robbery; two joyn Merchants, one is robbed, both shall joyn in the Action, and may also joyn in the Appeal. But it may be objected (as Whitlock Justice did) that the Master is not Hospitans, I say this is to no purpose; A Man put his Horse in the Stable, and before he goes to Bed or Lodging the Horse is gone, he shall have an Action although he did not lodge there. For the word (*translantes*) although he be at the end of his Journey, yet it is within the Custom, and he shall have Action. And by Crew, if I send Cloth to a Taylor, and it is stolen from him, the Taylor shall have an Action of Trespass, or the Owner.

Jones, The Case of Hue and Cry is a stronger Case than this is, for there the Servant ought to swear that he is robbed, and yet the Master shall have an Action: And for the word (*translantes*) all agreed that although he be at the end of his Journey, or at an Inne in London, yet he is within the Remedy of this Law: And if a Man stay in an Inne a month, or a quarter of a year, shall not he have an Action if he lose his Goods?

Doderidge agreed, that if a Man be boarded in an Inne, and his Goods are stolen, he shall not have an Action upon this Law. And notwithstanding this Objection, Judgment was given for the Plaintiff upon the Verdict.

Trin. 2 Car. In the King's Bench.

Sir William Button's Case.

SIR William Button a Justice of Peace brought an Action for these words ;
Sir William Button's Men have stolen Sheep, and he spake to me that I should not prosecute them, and it seems that the Action did not lie, because Sir William did not aver that he is a Justice of Peace, and it doth not appear in what County the said Felony was done, 36 Eliz. One brought an Action for these words ; A. is a coining Fellow, and the greatest Pick-purse in Northamptonshire, and there is not a Purse picked within 40 Miles of Northampton but he hath an hand in it ; And the Action did not lie because he did not aver that there were Purses cut.

Jones Justice put this Case, One saith, that A. is as strong Thief as any is in Warwick-Goal, he ought to aver that there is a Thief in Warwick-Goal, or otherwise they are not Actionable.

Doderidge put this Case, There is a Nest of Thieves at Dale, and Sir John Bridges is the maintainer of them, these are Actionable, because it implies Maintenance.

Note that it appeared upon a motion which the Attorney-general made against one Lane (who is a Recusant in Northamptonshire) that a Lease for years made by a Recusant of his own Lands after Conviction, if it be *Bona fide* will bind the King, but if it be upon Fraud and Covin, then it will not ; and Whitlock said, that it is a common Course for Recusants to make Leases after their Indictment and before Conviction.

The same Term in the same Court.

The Case of the Major, Bayliffs and Jurates of Maidstone.

In a Quo warranto depending against the Mayor, Bailiffs and Jurates of Maidstone in Kent, Serjeant Finch of Council with them of Maidstone, put the Case briefly in effect thus : In the Quo warranto against them, it was ordered by the Court that they should have day to plead until a fortnight after Trinity Term, and the truth was that they had not pleaded accordingly, whereupon Judgment was entered in the Roll, and the Writ of Seisin awarded, and Execution thereupon ; and afterwards by a private Order in the Vacation by the Chief Justice and Justice Jones, it was ordered that the Judgment should be stayed, and the truth was, that it was never entered amongst the Rules of the Court, and therefore he prayed that the Judgment might not be filed, but that the last Order might be observed, and that they might amend their Plea.

Hendon Serjeant on the other side said, that it could not be, for by the Judgment given the King was entitled to have the Profits of Franchises which he shall not lose ; and he cited the Case which is in F. N. B. 21. Error in B. R. cannot be reversed the same Term before the same Justices without a Writ of Error, but otherwise it is in C. B. and he said, that the same course was observed in Eyre, there can be no pleading in Eyre after the Eyre determined, and upon this he cited the Case of 15 E. 4. 7. before the Justices in Eyre, if the Defendant does not come the Franchises shall be seized into the King's hands,

hands, nomine distinctionis, and if the Party which ought the Franchise doth not come during the Eyre in the same County, he shall forfeit his Franchise for ever, so here after Judgment entred, there can be no Plea per quæ, &c. Finch, We have Order from the Court for Stay of Judgment, and here no perfect Judgment was given, and this is not without President, and he cited one Chamberlain's Case, where the Judgment was nigh to Perfection, &c. but he did not put the Case. Crew Chief Justice, in this Case there was the Assent of the Attorney-general, who prosecuted the Quo warranto, and so the Cases put by Hendon to no purpose, Jones upon F. N. B. 21. J. took this difference, true it is that the King's Bench cannot reverse a Judgment although it be Where the in the same Term without a Writ of Error, but this is where Error lies in King's Bench may reverse the same Cause in the same Court, as upon Outlawry, but if no Error lies its own Judgment in this Court for the same Cause, but in Parliament, then the King's Bench may reverse the Judgment without Writ of Error being the same Term. Writ of Error, And the Judgment here was ever of Record, for the Roll until it be fired and where amongst other Rolls is no Record.

And for the Case of 15 E. 4. 7. it is not like our Case in reason, for when a Roll is the Eyre is determined the Power of the Justices in Eyre is also determined, become a Record. but it is not so here, for the Justices have Power from Term to Term: But Noy argued further for the King, that it is a Judgment of another Term, and Execution awarded upon it, and said that it is without President that now it should be avoided, and upon the awarding of Execution, the King under his Seal hath averred that Judgment is given which cannot be falsified, and for Chamberlain's Case he said that there was an Assent in it. Doderidge, The Question which now is moved, is but this, whether a Judgment entred in a private Roll (as a Memorandum) and afterwards there is an Order that the Judgment shall not be filed, if the Judgment upon this shall be stayed: and speaks to it, and by him the Case of 15 E. 4. 7. is nothing to this purpose, for Justices in Eyre were Justices by Commission, and they had not the Custody of their Records, and so it differs from this Case.

And Jones Justice (which was not denied) if a Judgment be pronounced here and be not entred, the Judges may alter it the next Term. It was said by Noy in this Case that all Franchises in England are against common Right, and Execution of Justice, and for the present purpose, he cited one Sir John Wells's Case, where in a Quo warranto the Defendant had day to plead, or otherwise that Judgment should be entred to seise, and he failed to plead at the day, and the Judgment was not filed, and yet he could not be relieved: But it was said by some of the Justices, that this was a Case of great extremity. But by Hendon it was affirmed in the Exchequer in one Sanderson's Case, and in the principal Case the matter was adjourned for a fortnight, and ordered that the Plea should be accorded.

Mich. 2 Car. In the King's Bench.

Sharp *versus* Rust.

In an Action upon the Case, upon an Assumpſit between Sharp Plaintiff, and Walter Rust Defendant, upon Non Assumpſit pleaded, it was found for the Plaintiff, and it was moved in Arrest of Judgment upon these words in the Declaration, the Defendant (being Father to the Plaintiff's Wife, for whom the Apparrel was bought) said to the Plaintiff, deliver the Apparrel to my Daughter, and I will pay for them, and saith not to whom the Payment

Where a thing
incertain may
be made cer-
tain both in
Time, Estate
and Person.

Intention of
Parties to be
observed.

ment shall be made: And it was argued by Woobrich of Grays-Inne that this is no sufficient cause to stay the Judgment, for by necessary Implication and Reference of words precedent, the certainty of the Person appeareth to whom the Payment ought to be made. And he observed that in our Law the time, the Estate, the thing, and the Person not being sufficiently expressed, yet by necessary Coherence and Relation to matter precedent, they are sometimes made certain enough: 1. For the time, Perkins, p. 496. puts the Rule, if a Condition hath relation to an Act precedent, and no time is limited when it shall be done, yet it ought to be done when the Act precedent is done, and therefore if I. S. be bound to me in 20 l. upon Condition that if I enfeoff him of Black Acre, that then he will pay me 10 l. &c. in this Case presently when I have enfeoffed the Oligor of Black Acre he ought to pay the 10 l. notwithstanding there be no time limited when it should be paid. 2. For the thing being put uncertainly, yet the Communication precedent makes this certain, 30 H. 8. Dyer 42. in the Case of the Executors of Greenlise, where it is agreed, that albeit it is not shewn what thing is granted, yet it shall be the Land of which the Communication was. 3. For the Estate, although it be uncertain, yet sometimes it is made certain by the matter precedent, as in the Case, Co. lib. 8. A Stewardship was granted for life, and afterwards an Annuity was granted for the Exercise of that Office, without declaring what Estate he should have in that Annuity, and resolved that he should have the Annuity for life, because he had the Office for life. 4. For the Person, the Consideration sometimes ascertains the Person, and therefore if Land be given to one by Deed, Habendum sibi una cum filia donatoris, in frankmariage, this shall enure to both, because the Feme is Causa donationis, and by intendment of Law the Land and the Feme shall be given together to the Man for the Advancement of the Feme, as it is Mich. 2 & 3 Phil. & Mar. Dyer 126. a. 4 E. 3. 4. Plowd. Com. 158. enfeoff him and another, and bind him and his Heirs to warrant, and doth not say to whom he shall warrant, yet the Feofee and his Heirs shall have advantage of this Warranty, for it cannot have any other intendment: 6 E. 2. Voucher. 258. 22 E. 4. 16. & Kelleway 108. & Coke, lib. 8. Whitlock's Case, in a Lease for years reserving Rent, it is the surest way to make the Reservation to no Person in certain, but to leave it to the general intendment of the Law, 15 H. 7. A Man devisest that his Land shall be sold for the payment of his Debts, and doth not say by whom, they shall be sold by his Executors, because they are liable for the payment of his Debts, but if one devise that his Land shall be sold, and saith not for the payment of his Debts, the Devise is void, because the Law doth not intend in this Case to make the Sale, 40 E. 3. 5. 4 E. 3. Fitzherbert Obligation 16. Nota, if a Man be bound in Debt or Covenant by writing, and puts such a Clause in the writing. Et ad maiorem hujus rei securitatem inventit fidei jussores quorum unusquisque in tot. & in solido se obligavit, that although none speak there but the Principal in the Writing, if the others put to their Seals, they accept that which the Principal spake, and so become principal: 2 E. 4. 20. and here in our Case it appeareth that the Debt was so, and therefore it is reason that the Declaration should be so, for there cannot be a material difference between the Declaration and the Deed, and especially being upon an Agreement which is to be ruled according to the intention of the Parties, as it is in Plow. Com. 140. a. In our Law if any Parties be agreed upon a thing, and words are expressed or written to make the Agreement, although they be not apt words, yet if they have substance in them tending to the effect intended, the Law shall take them of the same substance as words usual, for the Law regards the intention of the Parties, and here the intent appeareth that the Assumption shall be made to the Plaintiff, although there want express words, and therefore he prayed Judgment for the Plaintiff. And afterwards the same Term Judgment was given for the Plaintiff.

The

The same Term in the same Court.

Beven *versus* Cowling.

In an Action upon the Case Littleton moved in Arrest of Judgment for the Action upon Defendant, wherein the Case was this, the Defendant assumed that if the Plaintiff would defer the payment of a Bond, in which one A. was bound to him, and would not implead him upon it, then he promised to pay it, and not sue such an he doth not say that he deferred the Payment until such a day, and therefore one, he would this is no valuable Consideration, so that the Action doth not lie, for notwithstanding this he may implead him presently; Mich. 12 Jac. Keble's Case, A man promiseth to pay so much in consideration of a Lease at Will, and it was holden no good Consideration, for by the same breath that he creates it, he may defeat it, and Pasch. 8 Jac. Austin's Case: A man promise that in consideration he would forbear another, he would pay it, and no time was limited, and therefore it was holden no good Consideration. Trin. 38 Eliz. Rot. 523. A man promise quod non implacabilit, and avers quod non implacavit, and because of the uncertainty it was holden no valuable Consideration.

Doderidge Justice, If there be no Consideration at the time, or no cause of Action, the forbearance afterwards will not make it Actionable, and he said that it had been adjudged in this Court, that a Consideration to forbear for a little time is not good, but by some to forbear for a reasonable time is good. But in the principal Case upon the hearing of the Declaration read, it appeared, that it was, that he should never implead him upon the said Obligation, so that if the Plaintiff brings an Action upon the Obligation, the Defendant here may have an Action upon the Case against him. Also it was non implacabilit, and this shall be taken indefinitely, quod nunquam implacabit, and therefore the Judgment was affirmed, for otherwise the Plaintiff shall both take advantage of this Promise and of the Bond also, and here he hath in a manner forsaken the benefit of his Bond, and hath betaken himself to the benefit of this Assumpst.

By Jones and Whillock Justices, if A. be bound to me, and I enter into Bond to him, that I will not sue this Obligation, I cannot sue him upon the first Obligation, without forfeiture of my Bond: and by Doderidge, if an Obligation be forfeited, and I say to the Obligee, do not sue the Obligo, or do not implead him, an Action upon the Case lies against me.

The same Term in the same Court.

Arnold *versus* Dichton.

In an Action upon the Case, and Non Assumpsit pleaded, it was found for Assumpsit. the Plaintiff, and Noy moved in Arrest of Judgment, that there was no Consideration to maintain this Action, the Case being thus: Arnold having married the Daughter of the Defendant's Testator, the Testator promised to give him 40 l. and Meat and Drink for a year, and a feather-bed and bolster, and afterwards the Testator in consideration that the Plaintiff would forbear to sue him all his life for it, promised that he should have as good a Portion at his death as any of his Children, and the Plaintiff declares that he

he gave to one Tho. P. one of his two Sons 200 l. and that he left him at the time of his death, but 30 l. but when he gave to Tho. P. the 200 l. appears not, peradventure it might be in his life time, and this Promise doth not extend to that which he had given before, as if a Man be bound to keep a Coal, and that no Prisoner shall escape, this only extends to a future Keeping, and future Escapes, and not to other Escapes which were before.

True it is, that sometimes the Law will alter the sense, as in the Case of 32 H. 6. where a Man is bound that his Feoffees, &c. And at another day Doderidge said, that the first Promise was but an Inducement to the second, and the Defendant hath pleaded Non Assumpsit to the last Promise, and then comes the Plaintiff and shews that he gave such an one 200 l. and doth not shew when this was given, and this may be before the Promise, and therefore I conceive the Declaration is not good: Jones agreed that the Declaration is not good, for admit that in this Case he had given to all his Children but one, great Portions before the said Promise, and had given a small Portion to one after the Promise, the Plaintiff now shall have but according to the said Promise, and it is alledged here, that he gave to such an one 200 l. which may be before the Promise, and therefore the Breach not well laid.

Whitlock contra: and that the Plaintiff shall have according to the best Gift in this Case, whether it were before or after the Promise, and that upon the intention of the Promise; for the intention is, that the Plaintiff should have as good a Marriage Portion with his Daughter, as any other of his Children should have: But by Doderidge this Construction cannot be made without offering violence to the words, for then daret should be for dedisset, and for any thing which appeareth he had a Portion before, and this was but a Super-addition.

Jones put this Case: I am bound to enfeoff J. S. of so much Land as I will enfeoff J. D. this extends not to a Feoffment which I have made to J. D. before, but only to a Feoffment which I shall make to him afterwards, which was not denied by Whitlock, and it was adjourned.

The same Term in the same Court.

Words.
Thou art a
Bankrupt Rogue.

Barker brought an Action upon the Case against Ringrose, and declared, that whereas he was of good Fame, and exercised the Trade of a Wool-winder, the Defendant spake these scandalous words of him, that he was a Bankrupt Rogue: and it was moved in Arrest of Judgment, that those words were not Actionable; for the words themselves are not Actionable, but as they concern an Office or Trade, &c. and it appeareth by the Statute of 27 E. 3. that a Wool-winder is not any Trade, but is but in the nature of a Porter, so that the Plaintiff is not defamed in his Function, because he hath not any: also it is not averred that he was a Wool-winder at the time of the words speaking.

Jones Justice: If one saith of a Wool-winder, that he is a false Wool-winder, Action upon the Case lieth; and it was demanded by the Court, what a Wool-winder was: and it was answered that in the Country he is taken to be a Wool-winder that makes up the Fleece, and takes the Dirt out of it: and a Wool-winder in London opens the Fleeces, and makes them more curiously up, and in London they belong to the main of the Staple.

Doderidge

Doderidge, If one saith of a Shew-man, that he is a Bankrupt, Action lies, In what Case
and so it hath been adjudged of a Shoe-maker : and note that if one saith of
any Man (who by his Trade may become a Bankrupt within the Statutes) to call a Man
that he is a Bankrupt, an Action lies, as of a Taylor, Fuller, &c. And the
Court seemed to incline, that in this Case (being spoken of a Wool-winder
in London) the Action lies : But Mich. 3 Car. the Case being moved again,
the Court was of Opinion, that the Action could not lie, and would not give
Judgment for the Plaintiff.

to call a Man
Bankrupt is
Actionable.

The same Term in the same Court.

Nota by Doderidge and Jones, Justices, that upon the principal Judge's Outlawry re-
vered, the Outlawry is also *Ipsa facta* reversed : Also if an Outlawry be awarded, if it be not per Judicium Coronator. (unless it be in Reversal of the
London) the Outlawry is void. principal Judgment.

It was demanded by the Justices, when the Outlawry and Judgment are affirmed, how the Entry is. And it was answered by Broome Secondary, that the Entry is general, *Quod judicium affirmetur in omnibus*: and this sufficeth.

But if the Judgment be affirmed, and the Outlawry reversed, then the Entry is, *Quod judicium affirmetur & Ultagario cassetur.*

The same Term in the same Court.

Calse and others, versus Nevil and others.

A Scire facias was brought by Joseph Calse and Joshua, Executors of A. against Nevil Davyes and Bingley, and the Case was this ; They became Bail to one Hall who was condemned in an Action to the Testator of the Plaintiff that the said Hall should either render his Body to Prison, or that he should satisfie the Judgment, the Defendants plead, that after the Scire facias returned, and presently after the Judgment, the said Hall brought a *Writ of Error* in the Exchequer-Chamber, hanging which, the said Hall, reddidit se prisone in exoneratione manucaptorum suor. and there died ; and the Plaintiff demurred upon this Plea, because it was double, and Calthrop argued for the Plaintiff, that it was double, or rather treble.

1. That Reddidit se prisone.
 2. That he was imprisoned.
 3. That he died in Prison.
- And to prove the Plea double in this Case, he cited 13 H. 8. 15. 16. 4 E. 4. 4. 21 H. 7. 10. The second matter that he moved against the former was, that pendant the *Writ of Error* reddidit se prisone, and doth not conclude upon the Record, &c. hoc paratus est verificare, as he ought to have done, and for this he cited 7 H. 8. Kelleway 118.

If J. S. be bound in a Recognizance, that A. shall appear such a day before the King's Justices at Westminster, if his Appearance be not recorded he shall not have any Averment, by Bricknell and Conisby, and in 30 Eliz. It was one Wicks's Case, which is ours in effect in case of Bail, Dyer 27. 6 E. 4. 1. 2. For the matter in Plea is nougat, 1. Because by the *Writ of Error* brought, the Scire facias against the Bail is not suspended, because the Bail is a distinct Record ; and upon this he cited the Case of the Ambassador

of Spain against Captain Gifford, which was, Trin. 14 Jac. That by the Writ of Error brought the Bail was not suspended, and he laid that it was so resolved also in Goldsmith and Goodwin's Case.

2. For the Render of the Principal to Prison, it is not good, because it doth not appear upon Record: and for this he cited one Aokin and Monk's Case, which is in 14 Jac. In Scire facias against the Bail, it is pleaded that the Principal had rendred himself to Prison, and upon the matter it appeared that the Render was upon Candlemas-day, which is not Dies juridicus: and so the Court this day had no power to commit him to Prison, for which the Plea was adjudged void.

3. For the death it is no Plea; the Bail by it is not discharged, because he hath not rendred himself in due time: and for that he cited Justice Williams and Vaughan's Case, which was Mich. 3 Jac. where in Scire facias against the Bail they pleaded that the Principal was dead, and thereupon the Plaintiff demurred, and in this Case two Points were resolved.

1. There was no Capias mentioned to have issued against the Principal, and yet resolved that a Scire facias would lie against the Bail.

2. That the Plea in Bail is noryg'd, because it may be that the Principal died after the Capias awarded, or after the Return thereof, because it appear-eth that there was once a default in the Principal, and so the Bail forfeited, and no Plea afterwards would discharge it, and upon this he put this Case:

A Prisoner escape out of Prison, the Coalter makes fresh Suit, and before he hath taken him, the Prisoner dies, this is the Act of God, and yet because it was once an Escape, an Action of Escape lies against the Coalter: Jeremy for the Defendant; and he remembred a Case which was Hil. 20 Jac. Cadnor and Hilderson's Case, that by the Writ of Error, the Bail is suspended. Nota, that it was agreed by the Court in this Case, that by the Writ of Error brought in, the Bail was not discharged, because it is uncertain whether the Judgment shall be reversed or not: Also it was agreed, that if the Principal dies before a Capias awarded against him, that the Bail is discharged: It was also agreed by the Court, that the Plea was not double, for the first matters are but an inducement to the last; and yet by Doderidge, If several matters are pleaded in Bar, and there be not any Dependency on them, the Plea is double, although none of them be material but one.

Jones Justice cited one Hobs and Tadcaster's Case; which was 43 Eliz. in B. R. where after a Writ of Error brought, a Scire facias issued against the Bail, and upon Nihil returned, the Plaintiff in the Scire facias brought in an Audita Querela, and there the matter came in question, whether upon the Judgment the Principal ought presently render himself to Prison, or that he should stay until a Capias awarded against him, and there it was resolved by Popham and all his Companions, that the Principal is not bound to render himself to Prison, until a Capias be taken out; so that if he dies after the Judgment, and before the Capias awarded against him, the Bail be discharged.

Also in the principal Case here it was resolved, that a Scire facias does not lie against the Bail, until a Capias be awarded against the Principal: and because no Capias in this Case was awarded against the Principal (which could not be by reason of the Writ of Error) before his death. And also the Plaintiff in his Declaration ought to have averred, and shewn that the Capias was awarded against the Principal. For these reasons Judgment was given quod querens nil capiet per Billam.

The same Term in the same Court.

Reynor *versus* Hallet.

In an Action upon the Case for these words, viz. Reynor is a base Gentleman, he hath four Children by his Servant Agnes, and he hath killed them all, or caused them to be killed: and after a Verdict for the Plaintiff, it was moved in Arrest of Judgment by Jerry, that the words were not actionable:

For, 1. As to the first words, Base Gentleman, they are but words of Choler.

2. The next words, He hath four Children by his Servant Agnes, cannot be actionable, for although he were once his Servant, yet he might be afterwards his Wife.

3. The Plaintiff hath averred in his Declaration, that he hath lived continently, and then he cannot have Children by his Servant Agnes, and then the words are not Actionable.

And 4. For saying he hath killed them is not actionable, and upon this he cited one Snag's Case, Co. lib. 4. who brought an Action for these words, Thou hast killed thy Wife; and it appeared by the Declaration, that his Wife was alive, and therefore it was resolved, that the words were not Actionable.

And as to the last Exception, it was said by Ashley Sergeant on the other side, that albeit the Plaintiff hath averred in his Declaration, that he lived continently, and so in a manner confessed that he had no Children, this is but for the Aggravation of the Offence of the Defendant: as when an Action is brought for calling one Thief, he avers that he lived honestly, and yet the Action will lie. But I confess if the Plaintiff had averred that he never had any Child, then it would be like to Snag's Case, Co. lib. 4. 16. a. and that the Action would not lie.

But in Anne Davyes Case, there she averred that she was a Virgin of good Fame, and free from all suspicion of Incontinency; and the Defendant said that a Grocer had got her with Child: Owen Ward's Case in Cook's Book of Entries hath the same Declaration as this, and it was the President thereof. But Jerry moved another Exception upon these words, He hath killed them, and doth not say Felonice, which is not good, for he might kill them in Execution of Justice, which is justifiable, Trin. 2 Jac. Willer's Case in the Court, it was adjudged, that for these words, Thou hast stolen a piece, and I will charge thee with Felony, an Action lies not, because a Piece is a word of doubtful signification.

And Trin. 20 Jac. It was resolved that these words (Agnes Knight is a Witch) were not actionable: but it was answered by the other side, that upon the whole frame of these words, they cannot be intended but to be spoken maliciously, and there can be no pretence of lawful killing of Children: Doderidge, All the words joined together are actionable; but these words only considered, He hath four Children by his Servant Agnes, are not actionable, and albeit he doth not alledge it Felony, yet this is a Scandal, and good cause of Action. Jones agreed, and yet he conceived, that for saying singly, that one hath a Bastard, an Action lies not, albeit the having of a Bastard be punishable by the Statute of 18 Eliz. cap. 1. But by him he hath killed the King, shall be taken in pejori sensu: otherwise it is, if the words of themselves be indifferent, as (Pope) and this word shall not be the rather taken in pejori sensu, having relation to all the Sentence: for the contrariety of the Declaration, it seems to me that the Declaration is good enough; but if one saith, Thou hast killed J. S. where in truth there never was such a man, it is not actionable.

Words.
Reynor is a
base Gentleman,
he hath four
Children by his
Servant Agnes,
and he hath kil-
led, or caused
them to be kil-
led.

But here the Averment of the Plaintiff is more general, *Ubi re vera*, he is not guilty or incontinent, which is a general Allegation: but if he had averred *Ubi re vera*, he never had any Child, there peradventure the Action would not lie, but here it will; Whitchock Justice agreed, and he said that the first words, hath had four Children by his Maid Agnes are actionable, and for the other matters they agreed, whereby Judgment was given for the Plaintiff.

The same Term in the same Court.

THIS TERM in the Common Place, Serjeant Hendon cited this Case to be adjudged 4 Jac. A Copy-holder made a Lease for years by License, and the Lessor died, that this Lease shall not be accounted Assets in the hands of the Executors, neither shall it be extended: But the Case was denied by Justice Hutton and others, and that an Ejectione firma lies of such a Lease.

But he said, that if a Copy-holder makes a Lease for years by License of the Lord, and dies without Heir, the years not expired, the Lord notwithstanding this may enter, for the Estate out of which this Lease was derived is determined: But Yelverton Justice was contra, because this License shall be taken as a Confirmation of the Lord, and therefore the Lease shall be good against him, and where (as I heard) it was argued by all, that if a Copy-holder makes a Lease for a year, this is a Lease by the Common Law, and not customary, and shall be accounted Assets in the hands of the Executors of the Lessor.

The same Term in the King's Bench.

NOta, Upon Evidence to a Jury between Buffield and Byburo, the Case appeared to be this, upon a Devise with these words, I will and devise that **A** and **B** my Feoffees shall stand seised, and be seised to the use of John Callis for life, the Remainder, &c. And the truth was that he had no Feoffees: and the Opinion of the whole Court (*nullo contradicente*) was, that this is a good Devise to John Callis, by reason of the intention. 38 H. 8. Bro. Devisi. 48. &c 15 Eliz. Dyer 323. were urged for the point of it, and by Doderidge the Case of 15 Eliz. is more strong than our Case is: Lynnen made a Settlement to his own use, and afterwards devised that his Feoffees should be seised to the use of his Daughter A. who in truth was a Bastard, and yet this is a good Devise of the Land by intention, for by no possibility they can be seised to his use.

Mich.

Mich. 2 Car. In the King's Bench.

Lemason and Dickson's Case.

Trin. 2 Car. Roll. 1365.

THIS Case was this, One Parcevall Sherwood was indebted to Susan Clarke, who brought an Action of Debt, by a Bill of Middlesex, which is in nature of a **Writ** of **Trespass** against him, and Sherwood upon a mean process was arrested by the Defendant (being **Bailliff** of the **Liberty** of White-Chappel) and being in his custody, he suffered him to escape: Afterwards Susan Clarke made the Plaintiff her **Executor**, and died, and then the Plaintiff brought an Action upon the Case against the Defendant upon the said Escape; and upon Issue joined, it was found for the Plaintiff.

And Calthrop of Council with the Plaintiff, moved, that the Action will well lie, for the Testator himself might have had either an Action of Debt, or upon the Case, upon the said Escape, and therefore the **Executor** may have the same Remedy, and that by the Equity of the Statute of 4 E. 3. cap. 7. which gives an Action to **Executors pro bonis asportatis in vita Testatoris**. And by 14 H. 7. 17. this Statute shall be taken by Equity, and **Administrators**, who are in the same Mischief shall have the same Remedy, albeit they be not named in the Statute, old Nat. Brevium 103. An **Executor** shall have a **Quare impedit** for a Disturbance made in vita Testator. and 7 H. 4. 6. and old Nat. Brev. 123. b. An **Executor** shall have an **Ejectione firmae** of an **Duster** made to the Testator. 17 E. 3. Executors 106. An **Executor** shall have a **Replevin** of **Goods** taken in vita Testatoris, and it hath been often times resolved, that an **Executor** shall have a **Trover** and **Conversion** of **Goods** taken and converted in vita Testator.

Doderidge demanded of him the reason why an Action upon the Case upon an Escape in the life of the Testator, should not lie against an **Executor**, to which he answered, because it was a mere personal **Wrong**. Doderidge, So is the **Wrong** here; and he said that an **Executor** cannot have an Action vi & armis, for a **Trespass** done in vita Testator, and in this Case because the Escape was in vita Testator. it is a personal **Wrong** to him, for which the **Executor** shall not have an Action upon the Case.

But it had been otherwise, if the Escape had been after the death of the Testator, and the Statute of 7 E. 3. doth not extend to it, because this Statute is only for **Goods**, but I agree to the Case of **Trover** and **Conversion**. Jones Justice, if this Action upon the Case will not lie by the **Executor**, it would be a mischievous Case, for as soon as the **Creditor** dies, the **Goalor** will and may suffer the **Prisoner** to escape, because none can have an Action against him, but as it appeareth by the Case of 15 Eliz. Dyer.

The Case is as mischievous for the **Creditor**, if the **Goalor** suffers an Escape, and dies, for there no Action lies against the **Executor**. And for the Case of **Quare impedit**, I agree to it, and so it was resolved in Brokesby's Case, 31 Eliz. that an **Executor** shall have a **Quare impedit** for a Disturbance made in vita Testator, if the **Disturbance** be a **Chatrel vested**, and therefore within the **Equity** of the Statute, which gives an **Action de bonis Testator**. and he was commanded to move it another time.

And at another day in Hillary Term next after, Grigs laid for the Defendant, that the **Executor** cannot have this Action for an Escape in vita Testator, because it is a mere personal Action given to the Testator, & moritur cum persona, and cited 15 Eliz. Dyer, Whitaker's Case, and that it is merely personal appeareth by 10 Eliz. Dyer 271. Where an **Executor** shall not be charged with

with an Escape in vita Testator, generally, where not Guilty is a good Plea, there an Action doth not lie for it against Executours. And this Case is not within the Equity of the Statute of 4 E. 7.

But it hath been objected that an Ejactione fitma is within the Equity of this Statute for the Executours to have it 7 H. 4. 6. but the reason there is, because it is to recover the Term it self; and not Damages only: and upon the same reason an Action of Covenant, upon a Covenant broken in the life of the Testator, is maintainable by an Executour, and that also is the reason of the Case of the Quare impedit, because there the Presentation is to be recorded: but in our Case Damages only are to be recorded upon the Escape, and so they are not alike.

2. The Arrest here is upon a mean Process, and upon a Bill of Middlesex, which is but in nature of a Trespass before Declaration, and I conceive that if one be taken by a Cap. ad satisfaciendum at the Suit of one, albeit the Party at whose Suit he is taken, dies, yet he shall be detained in Execution, but I conceive the Law to be otherwise upon a Cap. ad respondend, and albeit the Plaintiff saith that the Arrest was, ea intentione to declare against him in an Action of Debt, yet an intent is a secret thing, and albeit the Executour represent the Person of the Testator, yet he cannot follow it, and it is impossible to prove the intent.

Jerny for the Plaintiff said, that there is a difference, where an Action is brought by, and where against Executours, and this appeareth by Littleton's Case, that an Action of Account doth not lie against Executours for want of privity as to that purpose, but it is clear that Account lies by Executours, because this is a point of Interest: And here in this Case, the Testator had Interest in the Body by the Arrest, and this appeareth in Hichcock's Case, cited in Hargrave's Case in the Lord Cook's 5th Report, and by the Arrest the Body of the Party is as a Chattel in the Testator: and he compared this to the Case of 7 H. 4. 2. & 3. Fitzherbert's Executors 52. An Executour shall have a Raylment of Ward for a taking in the time of the Testator.

And 7 H. 4. 6. and a Case cited by Hankford, that if one enter upon a Statute Merchant, who dies, his Executour shall have an Assise, and therefore I conceive, that if a Tenant by Elegit be ousted and bring an Assise, if the Executours be ousted again, he shall have a Redilection upon the first Outster, because the Interest continues in him which was in the first Testator, and it is to be observed in our Law, that the Law enlargeth it self to give to Executours the same Remedy which the Testator had, and thereupon he cited Co. lib. 6. 80. a. & 3 Eliz. Dyer 301.

And in our Case the Body of the Party was in the Testator, as a Gage till Appearance, so that it was not only a personal Tort, for he had an Interest, and this appeareth by Co. lib. 5. 27. by a Case put in Russel's Case there, and if the Executours shall not in this Case have an Action, it would be very mischievous, for so the Coalter shall suffer Escapes dispenishable, 20 E. 3. Fitz. Executors 74.

But as to this Reason it was answered by Jones Justice, that the same Mischie夫 is of the other side, if the Coalter suffer an Escape and dies, an Action lies not against his Executours.

Calthrop on the same side cited F. N. B. 121. a. that a Man condemned in Debt, and imprisoned, if the Coalter suffer him to escape, the Party, or his Executour may have Debt against the Coalter: And he said, that at Common Law, Debt lay against a Coalter upon an Escape, as appears in Fitz. Debt 127. 38 H. C. placit. 36. And if it were a Debt in the Testator, then Executours may have an Action upon it.

But by Doderidge Justice in the said Case, Debt lies not at Common Law, for to what purpose was the Statute made? But for the Point in question, his sudden Opinion was, the Executour shall have this Action, and that it is within

Within the Equity of the Statute of 4 E. 3. for it is a Wrong, although it were upon mean Proces, and the Tort continues as to the Executor, for every thing which makes to the hindrance of the Execution of the Will, is wrong to him, and the performance of Wills is much favoured, because it is the last desire of the Party who is dead, and it is for the Publick Weal, because by this means Debts shall be paid.

And many Cases are within the Equity of the Statute, that are not within the Letter, as these Cases which have been put, all which he agreed: Jones Justice on the sudden was against it, and that this Case is not within the Equity of the Statute of 4 E. 3.

There are divers Actions which are not helped by this Statute, as Trespass for cutting of Trees, Battery, and the like; for the Statute is, de bonis & Catallis asportat in vita testator. An Executor shall have a Replevin of Goods taken in vita testator, for by this he recovers the thing it self, and shall have Detinue, but shall not have Trespass, for he cannot punish the Wrong done in the life of the Testator.

The Statute of 4 E. 3. is much enlarged by Equity, as the Cases which have been put, and extend also to Usurpation in the life time of the Testator, as appears in Russel's Case, Co. lib. 5. & 32 & 33 Eliz. in C. B. in the Bishop of Chichester's Case, that if the Testator dies within six months after the Usurpation, the Executor shall have a Quare impedit. And the Case of Trover and Conversion in vita Testator was maintained by Executors, and it was so resolved 41 & 42 Eliz. in the Councils of Rutland's Case in both the Benches, because this is in nature of a writ of Detinue.

Now for the Case in question, I conceive that it is not within the Statute of 4 E. 3. because it is neither bona nor catalla. Whitlock Justice contra, and that this Statute is very much taken by Equity, & præter literam, though not contra literam.

But Nota, that all agreed, if it were upon an Escape after Judgment, that the Action would lie by the Executors, according to the Case of F. N. B. 121. 2. But the principal Case was adjourned.

And afterwards Trin. 3 Car. It was argued again by Jeremy for the Plaintiff, and the sole Point was, A Man taken by Justic, and being in the custody of the Sheriff, escapes, the Party at whose Suit he was arrested dies, whether his Executor shall have an Action upon the Case upon the Escape, and he conceived that he might.

It hath been objected, that it is a personal Wrong, and as an Action doth not lie against Executors upon an Escape, in vita Testator. So not by Executors: To which I answer, that it is not merely Personal, but mixed with an Interest.

At the Common Law, an Executor could not have Trespass for Goods taken in vita Testator, but yet he should have a Replevin, 34 E. 3. Fitz. Avoury 257. and Executors 106. So at Common Law, a Successor should not have Trespass for Goods carried away in the life time of his Predecessor, but he shall have a Replevin, 9 H. 6. 25. but this was remedied by the Statute of Marlbridge, cap. 28. and so upon the Statute of 4 E. 3. de bonis asportat. &c. Trin. 14 Jac. Trover and Conversion hath been adjudged within the said Statute, for the Probe and Statute hath always been liberally expounded. 7 H. 4. 2. Fitz. Executor 52. if the Party An Executor shall have Ravishment of Guard taken away in vita Testator, and escape being also other Statutes which do not name Executors, have been expounded to extend to them, as the Statute of 23 H. 8. which gives Attaint, 3 Eliz. Dyer mean Proces, 201. Co. lib. 6. 8. Executors shall take benefit of the Pardon of 43 Eliz. & the Sheriff is 6 E. 6. Bendloc's Reports (which is cited there) Executors shall have Restitution upon the Statute of 21 H. 8. and Co. lib. 5. 31. and 27. Russel's Case, otherwise if an Executor shall have Trover upon Goods lost in vita Testator, and this is upon an Execution in manner and nature of a promise to have the Party in Court at the day, and

it is clear that upon an express Assumption to the Testator, an Executor shall have an Action upon the Case, and it hath been in manner agreed by the Court, that if it had been an Escape of one in Execution, that the Action would have lien by the Executor: and I see no difference between that and our Case. And it was adjourned.

The same Term in the same Court.

Upon an Information by Heath the King's Attorney, against two Men of the County of Huntington in the name of all the County, that they ought, and used to repair the Bridge of Eedes in the County of Huntington, Issue was joined by the County, whether they ought and used to repair this Bridge; and the Attorney gave no Evidence, but put it upon the other side, for he said by the Statute of 22 H. 8. cap. if it doth not appear that any particular Person, or Town ought to repair a Bridge, by reason of Tenure, or otherwise, that then the County where this is, ought to repair it.

But Nota, that the Issue was, whether they ought to repair the whole Bridge, and yet upon the Evidence it appeared, that only two Arches and an half of the Bridge was in the County of Huntington, and two Arches and an half in the County of Bedford, and the Jury found generally, that only two Arches and an half of the Bridge were in the County of Huntington, and say nothing where the rest was, for they could not find a thing in another County.

And also they found that the County of Huntington ought to repair all, but not that they used to repair it: And at another day Hedley Sergeant moved for the County, that the Verdict was not good, because the Issue was, whether they ought to repair, and a tempore cuius contrarium, &c. had repaired, &c.

And the Jury hath found that they ought to repair, which is but the half of the Issue, and also they find that they ought to do it, which is a Question in Law, and therefore void, 8 H. 6. 3, 4.

Secondly, The Issue is, whether they ought to repair the Bridge, and the Jury hath found, that they ought to repair two Arches and an half only, &c. and the Bridge is an entire thing.

The Attorney answered, that for the first Exception the Case of 27 Ass. Pl. 8. is against it.

And for the last, the very Case of 43 Ass. Pl. 37. is against it, and therefore the Court conceived the Verdict good, notwithstanding these Exceptions, Dodderidge Justice, by the Common Law before the Statute of 22 H. 8. if no Man by reason of Tenure or otherwise ought to repair a Bridge, the County ought to do it; like to the Case of 8 E. 4. Fishers by the Law of Nature may dry their Nets upon the Land of any Man.

The

The same Term in the same Court.

Doctor Cleland brought a *Writ of Error* against Baldock, upon a Judgment given in *Intr. H. II. 22* where the Plaintiff declared that the Defendant, in consideration that he would do all his Commands, honestly and truly for the space of a year, assented to pay him 10 l. and further declared, that he had done all his honest and lawful Commands, and this Promise being found by Verdict, Judgment was given against Doctor Cleland, and thereupon he brought this *Writ of Error*, and Green assigned two Errors.

1. The Assumption is, that he shall do all his Commands honestly and truly, and he hath declared that he hath done all his lawful and honest Commands, and he may do honest Commands, and yet not honestly.

2. It is said that Jurator. Accidens dampna, and it is not said occasione transgression. predict. and it is against all Presidents: But Nota, that there were these words, ex hac parte opposita, and therefore the Exceptions are disallowed by the Court, and the first Judgment affirmed.

The same Term in the same Court.

Secheverel *versus* Dale.

This Case was sent out of Chancery to this Court to know the Law therein, and in Trespass the Case was this: Henry Secheverel, the Father seised in *Fæ*, levied a Fine to A. and B. in *Fæ*, to the use of himself for life, absque imputatione vasti, with power to cut and carry away the Trees, and to make Leases for 21 years, or that Lives, the Remainder to the use of John Secheverel his eldest Son for life, without Impeachment of Waste, with the same Powers.

Henry the Father made a Lease to one (under whom the Plaintiff claims) for that Lives, rendering the ancient Rent, excepting all the Trees (unless those which shall be for Cropping, Lopping and Felling) Henry the Father dies, John the Son in the next Remainder cut certain Trees Victorin Secheverel who claims by the Lease made by the Father, brings Trespass, and two Questions were moved.

1. Whether Lessee for life without Impeachment of Waste, may make a Lease excepting the Trees, and it was objected by the Council of the Plaintiff, that he could not, because this second Lease ariseth out of the first Fine, and out of the Estate of the Conulor: But the Court *prima facie*, was of Opinion that he might well make such a Lease with such an Exception, see Co. lib. 11. Lewes Bowls his Case, and Doctor and Student, lib. 1. cap. 1. and by Doderidge Justice, the Lease ariseth out of both the Estates. Jones Justice, suppose the Lessor absque imputatione vasti, assign over all his Estate, might he cut the Trees: and it was conceived that he might; for by Doderidge he hath power to dispose of the Trees, as it was resolved in Lewys Bowls his Case. Jones, He hath no propriety in the Trees, until they be cut. Crew Chief Justice, Admit a Stranger cut the Trees, who shall have them: By all the Court the Lessee without Impeachment of Waste shall have them.

2. Point, Tenant for life without Impeachment of Waste, with power to cut and carry away the Trees, and make Leases for 21 years or there lives, the Remainder for life to J. S. without Impeachment of Waste, &c. Tenant for life makes a Lease for three Lives, and dies, whether he in Remainder for life, without Impeachment of Waste, with power to cut the Trees, may cut the Trees, and take them during the Lease for three Lives, and the Court seemed to be of Opinion that he might: And Leving of Council with the Plaintiff, argued, that when Tenant for Life without Impeachment of Waste with power to cut the Trees, and to make Leases for 21 years or three Lives, makes a Lease for three Lives, excepting the Trees, that this is a void Exception, because he hath no Interest, but a bare Authority, 27 H. 6. Fitz. Wast. 8. Statham tit. Wast. 1. makes this a Quare (which Statham was once the Owner of the Land in question.) A Man makes a Lease for life without Impeachment of Waste, a Stranger cuts Trees, the Lessee brings Trespasses, he shall recover no Damages for the value of the Trees, because the Proprietary belongs to him in the Reversion, and he may dispose of them, quare Dyer 284. Daunsley and Southwel's Case, Co. lib. 11. Lewys Bowles Case, that such a Lessee may take Trees which are blown down, and 3 H. 6. 45. Mich. 41. and 42 Eliz. C. B. Leechford against Sanders in an Action of Waste upon a Lease made to Sanders for life, with a Proviso that the Plaintiff might dispose of the Trees during the Estate, and resolved that the Action lies not, for notwithstanding this power, the Trees are demised to the Lessee also, so here when the Trees are excepted, he hath no Interest, but only an Authority.

2. The Exception is void for another reason, because when such a Lessee, makes such a Lease, this is not his Lease, but it hath its Operation out of the Original Fine, and he who makes this hath but the Nomination, and therefore cannot add a Condition or Exception to it. And if the second Lease shall have its being out of the Estate of the Lessee for life, then there shall be an Use upon an Use, as appears Co. lib. 1. 134. and that the Law will not allow. 15 H. 7. and Co. lib. 1. Albany's Case, If a Man devise, that his Executors shall sell his Land, they cannot add a Condition or Exception to this Sale, as an Attornment upon a Condition subsequent is void, Coke, lib. 2. Tooker's Case.

3. This Case may be resembled to the Case of Copy-holds, which is in Co. lib. 8. 63. b. in Swayne's Case: If a Lord takes a Wife, and afterwards grants Lands by Copy, according to the custom, and dies, his Wife shall not be endowed of this Land, for albeit her Title of Dower was before the Grant, yet the Title of Copy-hold (which is the custom) is elder than the Title of Dower; so in our Case, the Title of the second Lessee is derived out of the Estate of the Conqueror, and therefore shall not be clogged with the Exceptions of Lessee for life, without Impeachment of Waste.

4. This privilege to cut the Trees is annexed to the Estates, and goes along with the Estate, and therefore shall not begin before the Stranger be in possession, 3 E. 3. 44, 45. Idle's Case, 28 H. 8. Dyer 10. And it may be resembled to the Cases of 16 E. 4. and 27 H. 8. Tenant in Tail sold the Trees, if he dies before the Party takes them, he shall never have them, because he hath laid out his time. But it may be objected that upon such a Lease he may reserve a Rent, as it is in Whitlock's Case, Co. lib. 8. to which I will offer this difference, Lessee for life, with power to make Leases for three Lives, reserving Rent makes a Lease for three Lives, reserving Rent, this Reservation is good, because it is but a Declaration of the Lease, and of the Rent; but if there were no such Clause of reserving Rent, then I conceive it were otherwise.

But admitting all this were against me, yet the Justification of the Defendant is not good, for by the Exception out of the Exception, the Lessor cannot

cannot take the benefit of the Bodies of the Trees, because he will thereby deprive the Lessee of the Croppings and Loppings, &c. as in 28 H. 8. Dyer, Maleverell and Spynke's Case. Mylward of Lincolns-Inne for the Defendant. And first he conceived that the Lessee for life without Impeachment of Waste, might dispose of the Trees in the same manner as Tenant in Fee might do, with this difference, that the disposal thereof ought to be in his life time, and so it is resolved in Lewys Bowls's Case, Co. lib. i. 1. 46.

2. The second matter in the Case is, whether the Lessee for life, without Impeachment of Waste, &c. hath only an Authority, or an Interest in the Trees, and I conceive that he hath an Interest, for his power is to make Leases of it, or of any part for 21 years, or three Lives, and that the Conuozors shall be seised to the use of such Lessees, now when he makes a Lease excepting the Trees, the Trees are not demised, so that he remains still Tenant for life, without Impeachment of Waste for the Trees.

3. Excepting all Timber-trees, but for Fencing, Cropping and Lopping; it hath been objected that this Exception hath no Form: It is a general Rule, that if a Man makes a Grant, and in the close thereof except all that which was granted before, the Exception is void: and this appears by 34 Ass. Pl. 11. A Will was granted salvo stagno molendini: so here the last Exception takes away all that which was granted before, 38 H. 6. 38. in a Quare imedit 28 H. 8. Dyer 19. by Mountague, the cropping and lopping of Trees belong to the Lessee, like to the Duke of Norfolk's Case in 12 H. 7. 25. and 13 H. 7. 13. and 18 E. 4. 14. and albeit every Grant shall be taken more strongly against the Grantor, yet it shall have a reasonable intendment for the benefit of the Grantor, and this appears by 7 E. 4. 22. 17 E. 5. 7. 9 E. 4. 2. 21 E. 3. 43. so here the Exception shall have a reasonable intendment that he shall only have such Loppings and Croppings as shall be bestowed upon the Park, and no other. Doderidge Justice, I conceive that by the words Without Impeachment of Waste, he hath interest in the Trees as long as the Estate continues.

2. That when he makes a Lease by the second Power given to him, this is derived out of the Fine, and shall be good against him in the Remainder.

3. Because he hath power to dispose of the Trees, I conceive that when he makes a Lease, excepting the Trees, this is a good Exception, 24 Eliz. C. B. A Man made a Lease for years, now he hath the Waste of the Trees, if he assign over his Estate excepting the Trees, the Exception is void, but in our Case the Lessee hath not parted with his whole Estate.

4. So the sole Question is, Whether he in Remainder may cut the Trees during the Estate of three Lives made by Henry Sacheverel, and he conceived that he might, and so concluded for the Defendant: Jones Justice agreed, that the Lessee for life without Impeachment of Waste, hath interest in the Trees, but this Interest is concomitant with the Estate and determinable with it.

2. I conceive that the Exception is good. Such things which a Man hath by the Law he cannot resign to himself upon his Assignment, as the cropping, and lopping of Trees, as if Tenant in Tail after Possibility, &c. (who is dispuishable of Waste by freedom of the Law) assign over his Estate, reserving the Trees, he cannot cut the Trees, but here the Lessee hath a larger liberty than the Law gives to him, and he by virtue of this may give away the Trees; but I conceive that if he had assigned over all his Estate, then he could not have excepted the Trees, but here he hath not granted over all his Estate, for he hath a Remainder, and may have an Estate in Possession afterwards, and upon this Lease for three Lives he may reserve a Rent to himself.

3. I conceive, that this Lease is derived partly out of his own Estate, and he hath not the mere Nomination, and partly out of the first Fine, and there-

soze such Lessees shall be subject to all Charges made by the Tenant for life who made the Lease, as Statutes, Recognizances, &c. to wit, during the life of the first Tenant for life.

4. When he dies who made the said Lease for three Lives, whether he in Remainder may cut the Trees during the said Lease; and he conceived (yet not without some doubt) that he had no power during the lives of the said Lessees. Whitlock Justice agreed with the rest, so that it was agreed by all.

1. That it is a good Exception.

2. That the second Lease is drawn out of the Fine: And the Question now is, whether he in Remainder without Impeachment of Waste with power to cut the Trees, hath power to cut them, during the lives of the said three Lessees, and the Council was commanded to speak to this Point only upon another day.

The same Term in the same Court.

Foster and Tayler's Case.

E Rro: was brought upon a Judgment given in C. B. and after the Record was certified unto this Court, the Common Pleas amended a Rasure of the Record which was there, and now Bramston Serjeant moved for the Defendant, that the Record might be amended here: Jones Justice, I doubt whether an inferior Court can amend after the Record is certified here, for then it is but a piece of Parchment with them: Bramston, It is resolved that it may in Blackamore's Case, Co. lib. 8. Doderidge, The Doubt is, whether it may be amended after Error assigned in the same Court, for this takes away the benefit of the Law from the Plaintiff in the Writ of Error. Jones, at another day said, that if in nullo est erratum had been pleaded, it could not have been amended.

And as it is, it cannot be amended, because now it is assigned for Error; and the Plaintiff was once entitled to his Writ of Error, which shall not be taken away from him afterwards: and in 11 Jac. there was such a Case moved by Yelverton the King's Solicitor, and agreed that it could not be amended.

And Pasch. 17 Jac. one Abbington's Case upon a Rasure, as our Case is, and it was doubted whether it could be amended: and by Broom Secondary to the said Case, it was amended. Doderidge, In this Case, it may be mended, albeit it be after Error brought, because it is only the Error of the Clerk, and it is amendable, although the Error be assigned in the same Point, and so was the Opinion of the whole Court, and therefore it was amended.

The same Term in the same Court.

W^ELL of the Inner Temple moved for a Prohibition to the Ecclesiastical Court at Worcester, and shewed for cause. 1. That the Suit there was for Money, which by the assent of the greater part of the Parishioners of D. was assed upon the Plaintiff for the Reparations of the Church, to wit, for the recasting of their Bells, the truth is that the Charge was for the making of new Bells, where there were four before, whereby it appears that it was merely matter of curiosity, and not of necessity, for which Parishioners shall not be liable to such Taxations, and he relied upon 44 C. 3. 19. by Finchden. 2. The Party there is over-charged, of which the Common Law shall judge. 3. The Party hath alledged a Custom that he and all those who hath an Estate in such a Tenement, have used to pay but 11 s. for any Reparation of the Church. But the Prohibition was denied, and by Doderidge in the Book of 44 C. 3. there was a By-law in the case to distrain, which is a thing merely temporal, for which the Prohibition was granted & per Curiam, in this Case the Assesment by the major part of the Parishioners binds the Party, albeit he assented not to it: and the Court seemed to be of Opinion that the Custom was not reasonable, because it laid a burthen upon the rest of the Parish. Littleton of Council of the other side, Suppose the Church falls, shall he pay but 11 s & Whitlock, If the Church falls, the Parishioners are not bound to build it up again, which was not denied by Justice Jones.

The same Term in the same Court.

A Prohibition was prayed, because a Person had libelled in the Ecclesiastical Court for the tenth part of a Bargain of Sheep, which had depastured in the Parish from Michaelmas to Lady-day: and the Party surmised that he would pay the Tenth of the Wool of them, according to the custom of the Parish. But the Prohibition was denied, for as Doderidge Justice said, by this way the Parson shall be defrauded of all, if he shall not have his Recompence, for now the Sheep are gone to another Parish, and he cannot have any Wool at this time, because it was not the time of Sheering. Nota, per Whitlock, de animalibus inutilibus, the Parson shall have the tenth part of the Bargain for Depasturing, as Horses, Oxen, &c. but de Animalibus Utilibus, he shall have the Tythe in specie, as Cows, Sheep, &c.

The same Term in the same Court.

Upon an Issue joined in an Ejectione firmæ, it was found for the Plaintiff, and Lewknor moved in Arrest, &c. because the Ejectione firmæ was de Messuagio sive Tenemento, which is not good for the certainty, and so it was resolved 12 Jac. in this Court, an Ejectione firmæ lies not, De Tenemento. Co. lib. 11. 54. Savil's Case. And it was resolved in the Exchequer Chamber, that it lies not de peccata terra; and in this Court in Rhetorick and Chappel's Case it was resolved that it lies not De Mess. & Tenemento.

The sante Term in the same Court.

*Sir Robert Brown *versus* Sir Robert Stroud.*

In Debt upon an Obligation for performance of certain Covenants contained in certain Indentures made between the Parties aforesaid, and the Covenant upon which the Question did arise was this: R. B. being seised of the Mannor of Dale, and S.R. S. of the Mannor of Sale, they exchanged the one for the other, and the Mannor of R. B. being more worth than the Mannor of R. S. R. S. covenanted to pay for the said Mannor 1200 l. and no time was limited when the Money should be paid, and the Money not being paid within a year after, R. B. bargained and sold the said Mannor by Deed indented, and inrolled to J. S. and his Heirs, and afterwards brought an Action of Debt against the said R. S. for the said 1200 l. who pleaded the matter in Bar, and Jeremy argued for the Plaintiff, that this Plea shall not discharge the Defendant of the said Covenant, for it is a reciprocal Covenant, and he ought to sue the other Party for the breach of the Covenant; and it is a perfect Bargain Dyer 30. 14 H. 8. 9. and here the Agreement is in Writing, and it is good, albeit there be no limitation when the Money shall be paid, 37 H. 6. 9. Calthrop for the Defendant, that the Action could not lie, for the Contract is Executory, and therefore is not to pay the Money till he hath the Mannor, for the Covenant is that pro Maner. &c. he should pay him 1200 l. and the word [pro] implies a Condition and Consideration, and being Executory on the one part, shall be also Executory on the other part, 9 E. 4. 20, 21. Abridg. in Plowden 134. in Browning and Beston's Case, 15 E. 4. 4. If A. grant to B. all the ancient Pale, and for them B. grants, that he will make a new Pale for A, if B. cannot have the old Pale, he shall be excused from making the new Pale, for he cannot have the one without doing the other, 6 E. 6. Dyer 75. The Contract was, pro 20. which makes a Condition, 15 H. 7. 10. by Fineaux, If a man covenant with me to serve me for a year, and I covenant to give him 10 l. he shall have an Action for 10 l. although he do not serve me, otherwise if I covenant to give him 10 l. for his Service.

Also there is no time limited when the Payment shall be made: true it is, that in Co. lib. 6. 30. when the Act to be done is a transitory Act, and no time is limited there, it ought to be done in convenient time, but the Law shall judge of the Convenience of this time, and the Law will never judge the time of Payment to be before he hath the Mannor, pro quo, &c.

In many Cases when no time is limited, the Law will appoint a time, as appeareth in 33 H. 6. 48. and Perkins 799. But now in our Case the Law will never appoint that this Money shall be paid, because the other Party hath disabled himself to perform his part; like to Sir Anthony Maynes Case, Co. lib. 5. 21. Doderidge, The Bargain is not perfect, because no day of Payment is limited, and the other shall have no Action of Debt for the Money before he hath the Mannor. Jones, If I covenant to make a Feoffment to J. S. and he covenant in consideration of that Covenant to pay me 10 l. he shall have an Action of Debt against me, before he hath made the Feoffment.

And at another day in Trinity Term, 3 Car. Noy argued for the Plaintiff, and opened the Case thus: Amongst other Covenants in certain Indentures between them it was agreed, that whereas Sir Robert Brown the Father was seised of the Mannor of Gadmaston, with the Advowson appendant, and Sir Robert Stroud of the Mannor of D. the same County, that there should be an Exchange between them of the said Mannors, and because the Mannor of Gadmaston

maston was the better, Stroud covenanted with the Father and the Son to pay 1200 l. to the Father for the Demesnes of the said Mannor and Adbowson, and that at Michaelmas next ensuing, there should be a mutual Entry into the said Mannors, and that in the mean time either of them should take the Profits of their own Mannors, and that they should deliver each to other their Evidences, and that Assurances should be made as Council shold advise; the Plaintiff declare, that they had performed all the Covenances which were to be performed on their part, and that the Defendant had not paid the 1200 l. and that theres upon this Action of Covenants was brought.

The Defendant protestando that the Plaintiff had performed the Covenants, and had not produced their Evidences, &c. for Plea saith, that the Plaintiff after Michaelmas bargained and sold the Mannor of Gadmaston to J. S. and his Heirs, upon which the Plaintiff demurs, and he conceives that notwithstanding the Sale after Michaelmas, yet an Action of Covenant lies for the 1200 l. but otherwise it had bin if he had sold it before Michaelmas. But it hath been objected that the Money by the Covenant is to be paid pro the Mannor, and therefore because the Defendant cannot have the Mannor, he shall not pay the Money, and for this 9 E. 4. 20. and 24 E. 3. 21. have been cited that [pro] implies a Condition, as pro servitio pro maritagio, but these Cases do not resemble this Case in reason, because the Fact to be done here, rests upon an indefinite time, and the Defendant is to do the first Act, and the Defendant is bound to a certain time for the doing of this Act. For the first it is agreed, that the Defendant shall pay 1200 l. and the Plaintiff agrees to make Assurances for this Mannor, and that the Assurances should be made as Council shold devise, and I conceive that the Defendant ought to procure the Council to devise, for mutual Assurances ought to be made, and either Party ought to appoint what Assurances he would have, and the one ought not to be a Carver to the other, neither can one know what Council the other will have, and upon this reason is the Case, 9 E. 4. 3. 4. and Plow. 15. b. the Case of the Well, it shall be weighed by him who is to have the Profit, peradventure if it were in case of an Obligation to perform Covenants, there he ought to procure the Counsel, for saving the Penalty of the Obligation; but it is otherwise here in case of a Covenant, Co. lib. 5. 22. b. 18 E. 3. 27. and 4 E. 3. 29. If a Man be bound to be ready to levy a Fine such a day, yet the other ought to bring the Writ of Covenant against him before that day, for otherwise he cannot levy a Fine.

But now the Law is altered, for now Fines are levied, and Writs of Covenant are sued out afterwards, 17 E. 4. 2. per Pigot: If I am bound to you in 20 l. to enfeoff you at such a day of such Land, if you please to take the Feoffment, you are bound to let me know your pleasure, and here the Assurance is for the benefit of the Defendant, and he cited Co. lib. 5. 23. and 7 E. 4. 13.

2. For the time, this Assurance ought to be devised by Council before Michaelmas, or otherwise the Plaintiff shall be enforced to keep his Mannor all his life, and shall be hindered of the Sale of it for Payment of his Debts, or other Necessaries whatsoever. And 17 E. 3. 1. Liking ought to be shewn in convenient time; And it appears by the Articles that the time intended was before Michaelmas, for every thing to be done by the Articles, was to be done before Michaelmas, Hill. 37 Eliz. Rot. 99. B. R. between Mills and Parsons: A Open covenanting in consideration of 42 l. Rent to be granted to him, payable at Michaelmas and Lady day, yearly, to levy a Fine of a Mannor to the use of Sec. and the Assurance of the Rent is not made before Michaelmas, and it was resolved that the Covenant was not performed, for the Grant of the Rent ought to be before Michaelmas, for otherwise he could not have the benefit intended, and cited also Dyer 347. and 20 Eliz. Dyer 361. and in this Case there could be no Execution of other Articles if the Council did not devise them before Michaelmas.

But

But it hath been objected that the Plaintiff hath not fully shewn the performance of the Covenants of their part, but only by Implication, albeit they have performed, and they have not averted that the Defendant hath not devised.

Answ. To which I answer, that this is good enough; but where I covenant to do no Act upon a future Contingent Act to be done by another, there ought to them be particularly, but otherwise in this Case, and this is for the benefit of the Defendant, and therefore he ought to shew it, and to this purpose is 3 E. 3. Fitz. Det. 157. and 18 E. 3, 4, &c. Jones Justice, suppose the Defendant had demanded the Assurance after Michaelmas, and before the Sale, what shall be done? Noy, nothing can be done after Michaelmas: and it was adjourned.

The same Term in the same Court.

Sanders and others, versus Meryton.

In an Action of Covenant the Case was this, Amongst other Covenants in a certain Indenture made between Sanders and others to the Lessors, and his two Lessors, the Lessors covenant to discharge them of all Incumbances done by them or any other Person, and the Plaintiff assign for Breach, that one of the Lessors had made a Lease, and thereupon then brought this Action. And Goldsmith moved in Arrest of Judgment, that the Writ was not well laid, because it is only laid to be done by one of them, and the Covenant is to discharge them of Incumbances done by them, which shall be intended joint Incumbances. Doderidge Justice, the Covenant goes as well to Incumbances done severally as jointly, for it is of all Incumbances done by them or any other Person, and so was the Opinion of the other Justices, and therefore the Exception was overruled.

The same Term in the same Court.

Dickar versus Moland.

In Replevin, the Case was thus: A Man made a Feoffment to the use of himself for life, the Remainder to his Son in Tail, with Remainder over, the Defendant made Consuance as Bayliff to the Son for 4 s. Rent due to him before the said time, in which, sc. to wit, 1 Jan. 18 Jac. which time was before the death of the Feoffor, whereupon it was moved for the Plaintiff, that the Avowry could not be good, and Roll argued for the Defendant, that it is good enough, for the *ante predictum tempus quo*, sc. is good enough, and the (scilicet) is void, for by this it appears that the Rent is due to another, 20 H. 6. 15. And a (scilicet) is but an Exposition of that which is, once before, and it shall not destroy the precedent matter, but if it be contrary to it, it is void, Cor. 5. Knight's Case, A scilicet shall not make an alteration of that which went before, 15 Jac. B. R. Desmond and Johnson's Case. In a Trover and Conversion the Plaintiff declared that he was possessed of the said Goods. 1 Jan. 15 Jac. and that Postea, scil. the first day of May be in the year aforesaid lost them, and that they came

came to the hands of the Defendant, and upon Issue joyned, it was found for the Plaintiff, and this was moved in Arrest of Judgment, and by the Court the (stil.) was agreed to be void, and the *Postea* good ; and the like Case was 17 Jac. in Debt. The second Question is, a Man makes Conuance for Rent for him in Remainder in Tail, and does not alledge the precise time when the Lessee for life died, but only that he died, and I conceive that it is well enough.

1. Because an Avowry (which is in lieu of an Action) is a real Action, and in real Actions no precise day need to be alledged.

2. Because he avows for 4 s. Rent due, and the Arrear to the Remainder, which implies that the Lessee for life is dead ; See 14 Eliz. Dyer. The Case of a Person, in one Arundall's Case ; a Man was Lessee for ninety years, if the Lady *Mosley* should so long live, in an Action brought by him as Lessee for years, in his Declaration he did not aver that the Lady *Mosley* was alive, and yet awarded good, Trin. 12 Jac. in *Hord* and *Paramore's* Case, the Defendant avowed as Heir of Sir John Arundell, and alledged no time in certain of the death of Sir John Arundell, and yet awarded good for the reason aforesaid, and therefore he pray'd Judgment for the Avowant.

The same Term in the same Court.

In Trespass, Jermy for the Plaintiff took some Exceptions to the Plea of Intr. Hill. 1. the Defendant : 1. That the Defendant claim Common in Trigemore Car. Rot. 331. *Mor* ratione Vicinagii, and doth not say, a tempore cuius contrarium memoria hominum non existit. 2. The Defendant alledgedeth that he and all his Occupiers of Down-close had used to have Common in the said Tridgemore *Mor*, &c. whereas he ought to have shewn what Estate they had in Down-close who have used to have this Common : Roll, there need no Prescription in this Case, no more than in a common Appendant (which Case of a common Appendant was agreed by the whole Court) for it is mixt, 6 E. 4. 55. Co. lib. Intr. 625. tit. trespass. For the second Exception, I agree that if it be by way of Prescription, then it is not good, as it is alledged here, but if it be way of Custom (as here it is) then it is good, for a Custom goes to Land, and a Prescription to Persons, Hill. 11 Jac. Higgs brought an Action upon the Case for erecting of a new Mill, and alledged a Custom, that he and all the Inhabitants, &c. an Exception was taken to it, and it was there ruled that it was good, because alledged by way of Custom : Co. lib. 6. Gateward's Case, and also Mich. 14 Jac. it may be alledged by way of Custom as our Case is, and 15 E. 4. when it is by way of Discharge, it may be alledged in all Occupiers. Jermy for the Plaintiff, it cannot be a Custom here, for as it is in 23 Eliz. Dyer, A Custom cannot extend to a particular place, and this was agreed by the whole Court : But there is another Exception, he claims Common in Tridgemore *Mor* for Cattel Levant and Couchant in Down-close, and does not aver, that these Beasts were Levant and Couchant upon Down-close, and per totam Curiam, this ought to be averred, and it was also agr'd that in this Case he ought to have prescribed : But for the Exception of all Occupiers it was doubted : but for the other Exceptions Judgment was given for the Plaintiff.

The same Term in the same Court.

Chamber's Case.

It was said in this Case, that in Debt upon a Recognizance acknowledged in Chancery, or in any other Court, the Defendant cannot demand Oyer of the Condition, for the Recognizance is not in Court as an Obligation is, when Debt is brought upon it: But if Debt be brought upon a Recognizance acknowledged in this Court, then the Defendant may demand Oyer of the Recognizance.

The same Term in the same Court.

Harison *versus* Errington.

In Error to reverse an Indictment of Rascous and Riot, taken in the County Palatine of Durham, Banks assigned the Errors, whereof one was, there was a Warant to thre conjurors, & divisim to arrest the said Harison, and two of them arrest him, and therefore the Arrest was not well done, for it ought to have been by one, or all thre, and the reason is, because it is a Ministerial Act, otherwise if it had been a Judicial Act, 14 H. 4 c. 34.

2. The Indictment of Riot was against three, and the Jury found only one of them guilty of the Riot, this is a void Verdict, for one alone cannot make a Riot, like to the Case in 11 H. 4. 2. Conspiracy against two, and only one of them is found guilty, it is void, for one alone cannot conspire. And at another day in the same Term Nov took other Exceptions.

1. Because the Indictment is Jurator. pro Domino Rege presentant. &c. and doth not say, that twelve Jurores presentant, and peradventure but eleven did present.

2. The names of the Jurors ought to have been certified, for peradventure they are not probi & legales homines, but Villains and Out-laws, 15 H. 4. 41.

3. It is found that Rolson the Sheriff by virtue of a Writ directed to him, came, &c. and upon this Recours was made by Harrison, &c. and it doth not appear what manner of Writ it was, scilicet, Elegit: Capias ad satisfaciend. o:, &c. and if there were no Writ there can be no Recours, and albeit he had a Writ, yet if Execution were done by virtue of another Writ which he had, the Party may disobey it, as if upon an habere facias scilicet, the Sheriff makes a Warrant as upon a Capias, the Party is not bound to obey the Wap- liff, if he be not a Wapliff known; but in Case it appears they were only Wapliffs pro hac Vice. Nota, that an Indictment before Coroners, which found the Earl of B. was felo de se, was quashed, because it did not appear that it was per sacramentum probor. & legal. horum: And in the Case of Sarum, this Term an Indictment was quashed for the same cause.

The

The same Term in the same Court.

Rochester *versus* Rickhouse.

In a Writ of Error to reverse a Judgment given in *Cessione firmæ in New-*
castle, Banks assigned these Errors.

1. The Plaintiff declares of a Lease made de Burg. sive Tent. which is not good, no more than in *Cessione firmæ de Well*. sive Tent.
2. Because the Judgment is not *quod capitatur* as it ought to be, because it is *vi & armis*.
3. The Judgment is *Ideo concessum est*, where it ought to be *consideratum est*, and for these Errors the Judgment was reversed: And the same day another Judgment between *Well* and *Margery Strongury* was reversed for the same causes.

The same Term in the same Court.

Petit *versus* Robinson.

In Error to reverse a Judgment given in C. B. in a Replevin, there Jeremy soz the Plaintiff assigned two Errors:

1. It appears, that after the *Writ* and before the Trial, it was *coram Justiciar. Dic. Domini Regis*, and there was not any *Speech* of any King but of King James before, and there is no *Speech* of his Demise, and therefore this shall be intended before the Justices of King James, which cannot be.
2. Because the *Nisi prius* is certified to be tried before Francisco Harvey, Mil. uno Justiciar. &c. and the Postea returned, is before Francisco Harvey Arm. argued, and so there was no such Judge of *Nisi prius* as Francis Harvey: Banks for the Defendant, I conceive the first Error to be because the *Adjournment* was per br. Dom. Reg. and King James was named before, so that the *Objection* may be, that it shall be intended the *Writ* of *Adjournment* of King James, which cannot be, but I conceive the *Writ* is general, and shall not be intended, that it can be adjourned by the King's *Writ* who was dead before, and the Clerk of the Assizes, who certified it, is bound to take notice of the King's death, 37 H. 6. 28. and also the Record is not per br. Dic. Dom. Regis, but per br. Domini Regis, generally. And for the second, I conceive it is no Error, and if it be Error, then if the Certificate be not according to the Copy, out of which the Clerk certifies, it shall be amended, 22 E. 4. 22. 35 H. 6. 23. b. Co. lib. 8. 136. Blackmore's Case, which is a stronger Case than this. But it hath been objected, that the Record is certified by the Justices, and now there can be no Averment to the contrary; but I conceive that this Court may send to the Clerk of the Assizes to amend it, and those Objections were over-ruled in C. B. in the same Case. Doderidge Justice, I conceive that notwithstanding these Exceptions the Judgment ought to be affirmed, for as to the first, the Court is bound to take notice of the Demise of the King, and therefore it shall be intended the King that now is, and so the *Writ* of *Adjournment* good enough, in Dyer, King Hen. 8. made a Patent, and it was *Enricus Dei gratia, &c.* where it should be *Henricus*, and yet the Patent good; so in a *Writ* to the Bishop, the Subscription is, *Episcop.* Nor this is good enough, for the Bishop of Norwich is very well known. And for the other, I conceive it is not well alledged, because it is not shewn whether

ther he were a Knight at the time of the Certificate or not, and so may well stand together, that he was a Knight, for he might be an Esquire at the time of the Trial, and before the Record certified might be made Knight. Jones Justice to the same intent, and that we ought to take notice of the Demise of the King, and therefore it shall be intended of the Writ of Abjournment of the King which now is, and therefore is no Error, and yet if it were, it were amendable: Whitlock Justice agreed, and therefore the Judgment was affirmed by the whole Court.

The same Term in the same Court.

Crabbe and his Wife versus Tooker.

IN Covenant between Walter Crabbe and Anne his Wife, against Tooker, the Covenant upon which the Breach was laid, was this, Tooker the Defendant covenanted with Tooker his Son, and Anne Bladé (one of the Plaintiffs, whom he intended to marry) to give them their Meat and Drink in his House, and if any discontentent shall happen between the Father and Son, so that he, and his Wife Anne should disagree to dwell with Tooker the Father, then they should have 6 Beasts, Gates, &c. Tooker the Son died, Anne disagrees to dwell with Tooker the Father, and marries with Crabbe, who with his Wife Anne brings this Action; and Tylor argued for the Plaintiff that the Action lies, for albeit the Covenant be in the Conjunctive (if they disagree) yet it shall have a disjunctive Interpretation, as where a Man covenant to levy a Fine to one and his Heirs, if he dies the Covenantor may levy a Fine to his Heirs; and Hill and Grange's Case in Plow. Two Tenants in common grant a Rent, this shall be taken for several Rents, and Co. lib. 5. Slingsby's Case, also the Wife is Party to this Covenant, and she must either have Remedy upon this Covenant, after the death of her Husband, or not at all, for she cannot disagree in the life-time of her Husband per que, &c.

And it was agreed on the other side, that there ought to be a dislike between all joynly, the Father, the Son, and the Wife: and now one of them being dead, the Covenant is discharged, like to the Case put in Budene's Case, Co. lib. 5. If Administration be Granted during the Minority of three, if one of them dies, the Administration ceaseth, and 31 Eliz. in C. B. A Lease was made to three, and the Lessor grants to them to be dispuinable of Waste quamdiu cohabitarent, one of them dies, and it was resolved, that now they shall be liable to Waste. Also the Bar is not good, for it is pleaded that Discordia orta fuit, and doth not shew what manner of discord this was, and therefore not good, as 3 H. 6. In Annuity brought Pro consilio, &c. he ought to shew for what manner of Counsel it was: Whitlock Justice was of Opinion for the Plaintiff, and that this Covenant extends to the Wife, and that upon equal Construction, because it comes in place of the first Covenant, and this was intended for the benefit of the Wife, as well after the death of the Husband as before: Jones Justice was of the contrary Opinion, and that the second Covenant was a several Covenant from the first, and that the disagreement is to be made by all three joynly, and that when one dies the Covenant is gone, 2 Eliz. Dyer, A Man will that A. B. and C. his Feoffees shall sell his Land, B. dies, now the Authority is determined. The Lord Gray committed the custody of his Son to four, one of them dies, the Authority is gone, and in this Case there is no matter of Interest, but an Agreement, and in such a Case as this is a Feme Covert, hath a Will, albeit she hath no legal Will; but in this Case there ought to be a disagreement of both, and there ought to be a dislike of the Father also, and in the Declaration it is also said, that she disagreed.

Doderidge

Doderidge agreed with Jones, that the Declaration is not good, and that it is not warranted by the Covenant, and that the Breach is not well assigned. The Case is grounded upon the second Covenant which consists upon a Contingency which Contingency is, if there happen any discord between the Father and the Son, &c. the words are joyned, and all ought to disagree: True it is, that in some Cases a Conjunctive shall be taken for a Disjunctive, but this is according to the matter and circumstances of the fact, but in our Case it shall not be taken disjunctively. If the Father, the Son, and the Wife had disagreed, then it is clear that an Action of Covenant lies, but this is *casus omisus*, and no Provision for it. Also it is only alledged in the Declaration, that she disagreed, whereas a mutual disagreement between all ought to be alledged, and therefore Judgment was given, *Quod querens nil capiat per billam*. But all agreed, that the Wife might have boarded with Tooker the Father, if she would, but her new Husband could not.

A Thowe Serjeant took divers Exceptions to an Indictment of Forcible Entry upon the Statute of 8 H.6. against Plowden and others for expelling one Sym from his Copy-hold, and the principal Exception was, because (dissensivit) was not in the Indictment, and in truth it cannot, for albeit the Statute of 21 Jac. cap. 15. gives power to Judges and Justices of Peace to give Restitution of Possession to Tenants for years, and Copy-holders, in which there shall be an Entry, or Detainer by force, yet the Statute does not give an Indictment of Forcible Entry of Copy-hold. Noy a Copy-holder shall now have an Indictment of Forcible Entry, but (dissensivit) shall not be in it, for no Jury will find that, because it is not possible, because a Copy-holder hath no Free-hold, and yet a Copy-holder shall have a Plaintiff in nature of an Assize against a Stranger, but not against the Lord: and at last the Opinion of the Court was, that the Indictment was good.

U pon a Capias directed to the Sheriff of London to take the Body of J. S. the Capias was returnable die Jovis, which was the day of All-Souls, and thereupon the Sheriff took the Party, but he returned, that because the Return of the Writ was upon a day that was not Dies Juridicus, he suffered the Party to go at large: And the Return was holden insufficient, for by Doderidge the Writ was good, and the taking and detaining of the Party by virtue thereof was lawful, but yet he could not have the Party there at the said day, and therefore the Sheriff was compelled to bring the Party into Court, which the same day he did accordingly.

The same Term in the same Court.

A man granted a Rent-charge of 12 l. to one of his Sons out of the Manor of D. by Deed, and died, the Grantee lost his Deed, the Land is extended to I. D. by virtue of a Recognizance acknowledged by the eldest Son of the Grantor, the Grantee sue for his Annuity before the Council of York to be relieved in Equity, for that in respect of the loss of the Deed he could not have Remedy at the Common Law, and J. D. the Counsel obtained a Prohibition out of this Court upon this surmize, that although the Council of York should make a Decree, that he should pay the said Annuity, yet it should be no Discharge for so much against the Conqueror, because their Decree was no legal Eviction. Now came Smith of the Temple, and prayed a Procedendo for the Grantee to the Council of York, and the Opinion of the whole Court was, that a Decree, there being no legal Eviction, shall not be a Discharge for so much against the Conqueror. Doderidge, the Grantee of the Rent-charge,

charge, having now lost his Dead, can have no Remedy in Equity, for in this Case Equitas sequitur legem, and of the same Opinion were Jones and Whitlock: but by Doderidge) which was not denied) if the Grantee had lost the Dead by a casual Loss, as by Fire, &c. in such a Case he shall have Remedy in Equity: and he said, that in the beginning of King James, when Egerton was Lord Chancellor, there was such a Case in Chancery: A Grantee of a Kent-lease had Seisin of it, so that he might have an Allize, and he devised it to J. S. the Devisee sued in Chancery to have his Kent and Seisin of it, and he could have no Remedy for it in Chancery: And this was one Mallery's Case.

The same Term in the same Court.

O **P** **E** Heborne was indicted for stopping a Way, &c. and it was moved that the Indictment was insufficient, because it is not laid that it was communis via, but only that it was a way to the Church, and per Curiam, it was good enough, and by Jones Justice the Indictment is good enough, although there wants vi & armis, because he who is supposed to stop the way is owner of the Land.

In the same Term in the same Court.

A **N** Action upon the Case, upon a promise was brought in the Town of Northampton, and the Consideration alledged was, that if the Defendant here in the Writ of Error, would discharge Wagnot of Execution, &c. that then the Plaintiff here in this Writ of Error promised to pay him eleven pounds, and there the Defendant pleaded, *quod exoneravit illum de Executione relaxavit*. And Bolstred, for the Plaintiff moved this for Error, that the Plaintiff in the inferior Court did not shew by what manner of Release it was, nor that it was by writing; for this being the Consideration upon which the Action was grounded, ought to be put in certain, **M**ich. 15 **J**ac. **S**taple and **K**ing, Execution of a Consideration ought to be shewn, 35 **H**. 6. 19. a Discharge ought to be shewn in certain, 22 **C**. 4. 43. the Lord Lisle's Case, and **M**ich. 16 **J**ac. in this Court Liverel and Rivet's Case (which was entred, **T**rin. 16 **J**ac. **R**ot. 322.) in an Action upon the Case, upon a promise upon Issue joyned, it was found for the Plaintiff, and it was moved in Arrest of Judgment, because the Consideration was, that the Plaintiff should discharge one Dgle, and he declares, that he did discharge him, and thereupon he brought this Action, and because he declared but generally, *quod exoneravit*, the Judgment for that very cause was stayed, and 36 **E**liz. one covenanted to make an Assurance, and pleaded generally that he had assured, and resolved that it was not good, and in Rosse and Parry's Case this Term (which was entred, **T**rin. 2 **C**ar. **R**ot. 1408.) In Covenant the Defendant covenanted to give Security, the Defendant pleaded that he offered Security, and resolved that it was not good, *per que* &c. Jeremy for the Defendant, that the Plea is good enough, for a Release by Parol is sufficient, I will remember but one Book, upon which I will rely, 27 **H**. 8. 24. Jordan's Case, in an Action upon the Case, the Defendant assumed to the Plaintiff, that if the Plaintiff would discharge **J**. **T**. of such an Execution in which he is bound at the Suit of the Plaintiff, then if **J**. **T**. did not satisfie the Plaintiff by such a day, the Defendant would do it, and they were at Issue upon an Assumpsit, and there the Count is admitted good, and he need not plead it was by Writing, because the Discharge is good without writing, but it hath been resolved, that if a Man be in

Execution at my Suit, and I go to the Sheriff and command him to discharge the Party, this is a good Discharge, although it be by Parol. Jones, If I say to the Sheriff, suffer the Party to go at large, this is a good Release both to the Party and to the Sheriff, and by him (*relaxavit*) implies a sufficient Release, and therefore the Plaintiff in the Writ of Error shall be barred. And if a Man be bound to save one harmless in an Action brought upon this Obligation, he pleads that he hath saved him harmless, and shews not how, the Plaintiff demurs generally, he shall not now take advantage of it, Doderidge. The Cases put by ~~Wolstred~~ are not to this purpose, for all those Cases are of things in certain, and he agreed that a Release by Parol was sufficient, and the Case of 22 H. 8. is a stronger Case than this is. Whitlock agreed also, and therefore Doderidge advised the Plaintiff to be satisfied, or otherwise they would affirm the first Judgment.

*Trin. 2 Car. In the King's Bench.**Cary's Case.*

In Cary's Case of Grays-Inn (where these words were adjudged Actionable, You a Counsellor? a Fool, an Als, an Hang-man, a Counsellor of Law, a Fool in the Profession) it was said by Jones Justice, it was not sufficient to say, that he was eruditus in Legi, but he ought to say that he was Homo Conciliarius: and he said that in Maintenancie against Boughton, it came in question upon Evidence to a Jury whether one who is a Barrister may give Advice, and it was ruled he could not, albeit he had Letters Patents to enable him as fully as if he had been called to the Bar: and in Fleetwood's Case adjudged, that these words (You the King's Receiver? you are his Deceiver, are you not?) were Actionable.

The same Term in the same Court.

SIR Tho. Savill was indicted for Breach of the Peace within the Palace, to wit, for assaulting Sir Fran. Wortley, and he pleaded his Pardon, and Doderidge said, that to strike in the Palace was the loss of the Right Hand by the Law, and in this point our Law agrees with the Laws of France and Spain, and all other Nations, for as the Person of the King, so his Palace and Courts of Justice are so sacred, that such Contempts and Affronts are judged worthy of such Punishments, and said that the Book of 24 E. 3. 33. Fitzherbert Forfeiture, 22. (of which he would have Students to take notice) is, that where one came into the Palace armed, and being brought to the Bar in his compleat Armes, the cause was demanded, and he said that it was in his own defence, being in fear of a great Man then in Courte, and he was committed to Prison by the Court during the King's pleasure, and his Lands forfeited during his life. Vide for the like matter, 41 E. 3. Fitzh. Coron. 280. Dycr 188. 22 E. 3. 13.

Hill. 2 Car. In the King's Bench.

OP E Matthias Wheelhorse was indicted at the Sessions of the Peace, holden in the Town of Northampton, quia Noctivagus, and because he divers days and nights did frequent the House of &c. which was within the Liberties of Northampton, and was a suspected Bawdy-house : and Crawley Serjeant moved that this Indictment was insufficient for these reasons.

1. Because it does not appear in the Indictment, that the Party knew this to be a Bawdy-house.

2. Because it is not said that it was a Bawdy-house, but that it was suspected to be a Bawdy-house.

3. Because the Indictment is before Justices of Peace, Villæ de Northampt. and the House is infra libertates Villæ de Northampt. and it shall not be intended that the power of the Justices of Peace extend thither, and for it see Co. lib. 5. 120. Long's Case. 13 H. 7. 33, 34. 22 H. 7. Kelleway 89. Co. lib. 9. Mackaley's Case : and the Court gave no Opinion concerning the Exceptions : But another thing was moved, to wit, that one could not be indicted before Justices of Peace for being Noctivagus, but this is to be enquired of in the Leet, and in this the whole Court was against him, for it is a Misdemeanor, and it is contrary to the Statute of Winchester, and every one may arrest him : And at another day he moved this last Exception again, and said that the Justices of Peace have no power to fine Men that are noctivagant, yet true it is, that a Court-Leet hath such a power, Rastal. Leet 2. and true it is also (as it is in 4 H. 7. 1, 2.) that every one may arrest a Night-walker, but there it is said that if he appeareth to be a Man of good fame, the Party who arrests him ought to let him go at large ; and the Indictment here is only that he was Noctivagus, and it appears not that he is a suspicious Night-walker : and by Doderidge and Whirlock Justices (only present) by the Common Law every Man may arrest him who is Noctivagus, and the word (Noctivagus) implies that he was a common Night-walker, and they said that Justices of Peace by their Commission have power to take such Indictments, for it is of ill behaviour, and albeit the Indictment were nought for the other Exceptions, yet being good in this, it shall not be quashed, and therefore Judgment was given upon it, and the Party fined 40 s.

*The same Term in the same Court.**Sparrow versus Sherwood.*

I P Trover and Conversion of two loads of Fitches of certain Land, &c. The Defendant justifie by the Command of Hare, to whom part of the Land belongs; and to one Pots, to whom another part in Right of the Lady his Wife belongs, and shews that part of the Fitches did grow upon the Land of one, and part upon the Land of the other, and upon this the Plaintiff demurs.

1. Because he justifies by the Command of two generally, and he cannot justifie upon the Land of the one by the Command of the other, and therefore he ought to have alledged several Commands.

2. Because he does not shew particularly upon whose Land the Fitches grew, but that part grew upon the Land of one, and part upon the Land of the other, which is uncertain.

3. Because

3. Because the Wife of Pots is called by the name of Lady, and the Wife of an Esquire cannot be a Lady: Doderidge and Whitlock only present, for the first were of Opinion, that it was good enough; for although it were a sojnt Command, yet the Parties commanding having several Titles, it shall be taken as several Commands, reddendo singula singulis: and for the third, it is good enough, betng in a Plea, otherwise, if it had bin in a Writ: But for the second Exception, the Bar is not good enough, because uncertain, so that although upon other Exceptions moved by the Defendant, the Replication of the Plaintiff was not good, yet the Defendants Bar being ill, the Plaintiff shall have Judgment upon the Declaration: And the Plaintiff had Judgment accordingly.

The same Term in the same Court.

Risley *versus* Hains.

IN an Action upon the Case, upon an Assumpsit, the Plaintiff declared upon the Sale of the several parcels of Tobacco, to wit, for one parcel so much, for another parcel so much, and so forward, and in the Conclusion he saith, que quidem separales summa in toto se attingunt, to 55 l. which (being computed) is less than the Particulars, and upon Non Assumpsit it was found for the Plaintiff, and now Andrews moved in Arrest of Judgment, so that the Particulars, and the summing up of them differs, and this being in a Declaration (which ought to contain truth) it is not good, and so there appears to be no cause of Action, 35 H. 8. Dyer 55. And Grice's Case in the very Point, Mich. 17 Jac. in this Court, but by Jones and Whitlock Justices only present, the Declaration is good enough, for there is a particular promise for every parcel, and the summing up of particulars is only Surplusage and Officiousnes of the Clark, therefore the Judgment was affirmed: And Nota, that Jones said Obiter in this Case, that upon a Contract, the Party to whom Payment is to be made, need not make Request and afterwards it was agreed by the whole Court, that it should be amended, otherwise it had been more.

The same Term in the same Court.

A Great multitude of Welshmen were indicted for the death of a Man, by an Inquisition taken before the Coroner in the County of Montgomery in Wales, and Littleton of Council with the Welshmen took some Exceptions to the Inquisition: as, 1. That the Coroner cannot take any Inquest, unless it be super visum corporis, and to this purpose he cited Britton 6 Rich. 2. Coron. 107. 21 Edw. 4. 70. 2 Rich. 3. 2. This also is the reason that if a Man drown himself, and cannot be found, the Coroner cannot enquire of the death of this Man: but for the King to have a Forfeiture of his Goods, an Inquisition ought to be taken before the Justices of Peace, as it was resolved in this Court, Trin. 13 Jac. upon which the first Exception was, that the Inquisition was taken at D. in the time of King James, super visum corporis, in D. in the time of this King, and for this he cited two Presidents out of Coke's Book of Entries: Another Exception was, because

the Inquisition was per Sacramentum probor. & legal. horinum Com. prædict. whereas by the Statute of 4 E. I. this Inquest ought to be by Men of the four Towns next adjoyning, and this ought to appear in the Indictment also Hill. 10 Jac. Rot. 3. Co. lib. Intr. 354. And day was given to the Attorney-general, to maintain this Inquisition : But afterwards, Pasch. 3 Car. the Indictment was quashed, especially for the first Exception.

The same Term in the same Court.

King *versus* Merrick.

In an Action upon the Case for these words, I charge you King with Felony, and you Constable (innuendo Thomas Legat) to apprehend him : And a Verdict for the Plaintiff. It was moved in Arrest of Judgment by Bacon, that the words are not Actionable : The first words are not, because they are not an express Affirmation, and for this he cited Mich. 11 Jac. in this Court Powel and Baud's Case, where an Action was brought for these words, I have arrested Powel of Felony, for stealing Sheep of mine, and adjudged not Actionable.

Also the Plaintiff did not shew in his Declaration what kind of Felony this was, and it may be such a Felony for which an Action will not lie ; for there are divers kinds of Felony, and a Mayhem is one kind, as appears in 40 Ass. Pl. 4. 6 H. 7. 1. and in this Case it shall be taken in *minori sensu*, and it shall not be intended such a Felony for which he may be hanged : If one charge another with Felony because he hath committed a Mayhem, it is clear that an Action will not lie.

And the other words (I charge you Constable to apprehend him) are not Actionable, and the words are only spoken to the Plaintiff : Also the words are laid to be spoken in London, and it appears that the Constable was of a Town in Norfolk, who cannot apprehend any one in London. Earle for the Plaintiff. It hath been argued that the words are not Actionable, because Felony is a general word, and contains in it self a Mayhem also ; But I conceive that in this Case Felony shall be taken according to the general and common Acceptation, which is such a Felony for which a Man may lose his life, and for this he cited Co. lib. 4. 15. b. Yeomans charged Hext, for my Ground in Allerton Hext seeks my life, and if I could find John Silver, I do not doubt but within two days to arrest him upon suspicion of Felony : and it was adjudged that for the last words the Action lies, because he shall be imprisoned for suspicion of Felony, and Felony is there taken according to the common Acceptation of the word.

It hath been observed that there is no express Affirmation of the Felony, but I conceive that there is, 39 Eliz. Action was brought for these words ; I will call him in question for poisoning my Aunt, and adjudged that it lies, and Mich. 37 & 38 Eliz. Woodrose and Vaughan's Case for these words : I did not know Mr. Woodrose was your Brother, I will prove him perjured, or else I will bear his Charges : and adjudged Actionable. And Hill. 44 Eliz. Rot. 351. This Man (innuendo John Latham) hath cut my Wives Purse, and his Father knowing of it received it of him, and the Money and Rings therein, and therefore I charge him of flat Felony : and resolved that for these words (did cut my Wifes Purse) no Action lies, for the cutting of ones Purse only is not Felony, unless it be taken from the Person ; and to receive one is not Felony, but resolved that the last words were Actionable, and then it was agreed that if one say, that I. S. did set such an one that had committed Felony, and did suffer him to slip away, I charge him of Felony, these words are not Actionable, and Mich. 10 Jac. in this Court that these words (bear witness I arrest him of Felony) are

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are Actionable, and therefore he prayed Judgment for the Plaintiff. Dodridge Justice, the Words are not Actionable: And Hext's Case comes not to this Case, for there by the word (Felony) it was manifest what Felony he intended by the Circumstances of the Speech; to wit, that he meant such Felony for which he might lose his life, but the words here being general of Felony, it may be intended as well of a Mayhem as of any other Felony; for in an Appeal of Mayhem, he is arraigned as Felo Domini Regis 40 Ass. and the other Case of 44 Eliz. I do arrest him of flat Felony, is not consonant with with the reason of this Case, for there by the Arrest his liberty is taken away, but in this Case there is no restraint, and it is very hard to make these Cases agree together, for words are as variable as the faces of Men, &c. Jones Justice agreed, and he took it for a general Rule, that where words carry a double sense, and there is nothing to guide the sense more one way than another, there the words are not Actionable, for finis est legis dirimire lites: And therefore if one saith of another, that he hath the Pox, because the sense is ambiguous, it shall be interpreted in mitiori sensu, and therefore the words are not Actionable; so if one says of another, that he hath stolen his Apples, or his Corn, because they may be Apples from the Tree, or Corn in the Field, the taking whereof is no Felony: but it was adjudged in the Common Pleas, when I was there, that these words, viz. Thou art a Thief, and hast stolen my Corn, are Actionable by reason of the addition of the word Thief.

So that the speaking of words of a double sense are not Actionable unless ex antecedentibus, or consequentibus, it can be collected that the words were spoken in pejori sensu: Then the words in this Case (I charge you with Felony) peradventure intend such a Felony, for which he shall recover Damages only, which is Mayhem, and therefore no Action will lie. These words (Thou art forsworn) are not Actionable, because forswearing may be in ordinary Communication, or in a Court of Justice, and it shall be taken in mitiori sensu: but if he says, Thou art forsworn in a Court of Record, it is Actionable, and if in this Case he had charged him with Felony, and said further that he had stolen, &c. they would have been Actionable, but here he only charges him with Felony, which is an ambiguous word; and also it is no direct Assertion, and therefore not Actionable, and Judgment was given Quod querens nil capiat per Billam.

The same Term in the same Court.

Good's Case.

GOD and his Wife brought a Writ of Error upon a Judgment, given in the Court of the Castle of Windsor, in an Action of Debt there, which was entred, Trin. Mich. 2 Car. Rot. 119, 120. and two Errors were assigned. 1. Because the Judgment there is given in these words, *ideo consideratum ad iudicatum, & asselsum est*, whereas it ought to be only by the word *consideratum*, and the Judgment being the Act of the Court, the Law is precise in it, and therefore it hath been resolved, that a Judgment given by the word (*concessum*) is not good, but it ought to be by the word (*consideratum*). 2. The Costs *ex incremento*, are not said to be given, *ad petitionem querentis*, as it ought to be, for *beneficium nemini obruditur*, and therefore it hath been resolved in this Court, that an Alien born shall not have *meditatem linguae*, if he does not request it, and as to this it was answered of the other side, that Costs ought always to be assessed *ex petitione querentis*, and albeit here the request of the Plaintiff was not precisely

precisely put to increase of the Costs, yet at the beginning of the Judgment it is said, *Ideo ad petitionem querentis consideratum, &c.* And that Costs shall be given *ex incremento*, so that this request goes to all the Sentence, and by the unanimous Opinion of all the Court, the Judgment was reversed for both the Errors, for, 1. *Ideo considerat. adjudicat. &c.* is not good, the Judgment being the *A&t* of the Court, and the Law hath appointed in what words it shall be given, and if other words should be suffered, great uncertainty and confusion would ensue, and needless Verbosity is the Mother of Difficulty. 2. The Increase of Costs ought to be given *ad petitionem querentis*, and the words (*ad petitionem querentis*) being misplaced, will not supply this defect, and Damages *ex incremento* is always given *ad petitionem querent.* for as *Braston* saith, *Omne iudicium est triplex actus trium personarum, judicis, actoris & rei,* and if in this Case the usual form should not be observed, all would be in a confusion, and in as much as the words are mis-placed, it is as if they had not been put in at all, and therefore void, like to a Case put in *Wallingham's Case* in *Blowden*, where an Averment misplaced, is, as if there were none: In this Case the Judgment was reversed, and *Trin. 3 Car. in B. R. inter Hill. 2 Car. Rot. 849.* a Judgment was reversed, because it was *Ideo concessum & consideratum est.*



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